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No. 14,452

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY ALLEN NILES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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No. 14,452

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY ALLEN NILES, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division (10-11).[1]

The District Court made no findings of fact or conclusions of law. No opinion of the Court was rendered. The Court merely found the appellant guilty as charged in the indictment (36). Title 18, Section 3231, United States Code, confers jurisdiction in the

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[1]Numbers appearing herein within parentheses refer to pages of the printed transcript of record filed herein.

District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States (3-4). This Court has jurisdiction of this appeal under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed within the time and in the manner required by law (12-13).

STATUTES AND REGULATIONS INVOLVED.

The indictment was returned pursuant to the provisions of Section 12(a) of Public Law 759, 80th Congress, Second Session (50 U. S. C. App. 462(a), 62 Stat. 622).

Section 456(j) of the Universal Military Training and Service Act (50 U.S.C. App. Section 456(j), 65 Stat. 83, approved June 19, 1951) provides:

> "* * * (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. * * *"

Section 1660.1 of the Selective Service Regulations reads as follows:

> "1660.1 Definition of Appropriate Civilian Work. (a) The types of employment which may

be considered under the provisions of section 6(j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Selective Service Regulations provides as follows:

"* * * (d) If, after the meeting referred to in paragraph (c) of this section, the local board and

the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Section 1660.21 of the Selective Service Regulations reads as follows:

"1660.21 General provisions relating to orders by the local board to perform civilian work and performance of civillian work. (a) No registrant shall be ordered by the local board to perform civilian work in lieu of induction in the community in which he resides unless in a particular case the local board deems the performance by the registrant of such work in the registrant's home community to be desirable in the national interest."

STATEMENT OF THE CASE.

The indictment charged the appellant with a violation of Section 12(a), Universal Military Training and Service Act, 50 U. S. C. App. 462(a). It was alleged therein that the appellant having theretofore been duly classified in Class I-O, did knowingly refuse

and fail to comply with the order of his local board number 53 to proceed in accordance with said order to a place of employment designated by said local board No. 53 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest, as provided in said Act and the rules and regulations made pursuant thereto (4).

The appellant was arraigned (5). He pleaded not guilty (6). Trial by jury was waived and he consented to trial by the Court (7). The case was called for trial and evidence received on April 23, 1954 (7 and 8). A motion for judgment of acquittal was made at the close of the evidence and the matter submitted on briefs (8). The motion for judgment of acquittal was denied and the matter came on for judgment June 10, 1954 (9). The Court sentenced the appellant to eighteen months in the custody of the Attorney General and further granted a motion that appellant be released on bail pending appeal (10). The transcript of the record, including statement of points relied on, has been filed (43, 45, 46).

FACTS.

Appellant was duly and properly given a classification of I-O on January 8, 1952. On June 17, 1953 appellant was sent a notice which contained the following statement: "Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest, you have been

assigned to Los Angeles County, located at Department of Charities at 110 North Mission Road, Los Angeles 33, Calif." (Selective Service file, Gov. Exh. 1, page 140.)

On August 19, 1953 the State Director advised the local board that the form was improperly prepared and ordered it re-written. (Gov. Exh. 1, page 156.)

On August 24, 1953 a new notice was prepared and sent to the appellant, in which the following language appears: "Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest you have been assigned to institutional work located at Dept. of Charities, 110 North Mission Rd., Los Angeles County, Los Angeles 33, California". (Gov. Exh. 1, page 161.) The appellant refused to comply with the order of the local board.

QUESTIONS INVOLVED AND HOW RAISED.

1. Was the order of the local board for appellant to perform civilian work at the Los Angeles County Department of Charities, under the provisions of Sections 1660.1 and 1660.20 of the Selective Service Regulations, in conflict with the intent of Congress as expressed in the Universal Military Training and Service Act, and outside the scope of congressional authority, in that the work ordered was not national or federal work over which Congress would have authority?

2. Was the Congressional Act, as construed by the Regulations, and the order made thereunder which calls for a private non-federal labor draft for the involuntary performance of services that are not exceptional or related to national defense, in violation of the Thirteenth Amendment to the United States Constitution?

3. Is the Congressional Act, as construed by the Regulations and applied by the order, unconstitutional, in that it deprives the appellant of due process of law, contrary to the Fifth Amendment to the United States Constitution?

4. Is the Act, as construed and applied by the Regulations and the order, unconstitutional, in that it is an unlawful delegation of legislative and presidential powers and authority?

5. Is the order for work, made in compliance with the Act and Regulations, invalid in that it does not attempt to limit the work to be required of appellant to civilian work contributing to the maintenance of national health, safety or interest, as required by the Act?

SPECIFICATION OF ERRORS.

The trial Court erred in:

(1) Denying appellant's motion for judgment of acquittal.

(2) Failing to hold that the order of the local board for appellant to perform civilian work at the

Los Angeles County Department of Charities was in violation of the intent of Congress as expressed in the Universal Military Training and Service Act, and outside the scope of Congressional authority, in that the work ordered was not national or federal work over which Congress would have authority.

(3) Failing to hold that the Act, as construed by the Regulations and the order made to appellant, called for private non-federal labor draft for the involuntary performance of services that are not exceptional or related to national defense and was in violation of the Thirteenth Amendment to the United States Constitution.

(4) Failing to hold that the Act, as construed by the Regulations and applied by the order to the appellant, was unconstitutional in that it deprived the appellant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

(5) Failing to hold that the Act, as construed and applied by the Regulations and the order given appellant, was unconstitutional in that it was an unlawful delegation of legislative and presidential powers and authority?

(6) Failing to hold that the order for civilian work given appellant was invalid in that it did not attempt to limit the civilian work to be performed by appellant to such work as contributed to the maintenance of national health, safety or interest as required by the Act.

SUMMARY OF ARGUMENT.

POINT ONE.

THE ORDER OF THE LOCAL BOARD REQUIRING APPELLANT TO PERFORM CIVILIAN WORK FOR THE COUNTY OF LOS ANGELES, AND SECTIONS 1660.1 AND 1660.20 OF THE SELECTIVE SERVICE REGULATIONS ARE IN CONFLICT WITH THE SELECTIVE SERVICE ACT, IN THAT THE WORK ORDERED TO BE DONE IS NOT NATIONAL OR FEDERAL WORK, AS REQUIRED BY THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

Section 456(j) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 456(j), 65 Stat. 83, approved June 19, 1951) provides that a conscientious objector shall in lieu of induction do "such civilian work contributing to the maintenance of the *national* health, safety, or interest. * * *" (Italics ours.)

The key word here is "national", as distinguished from state, city or county.

The word "national" has a very important and definite connotation in federal jurisprudence. A reading of the index to the United States Code Annotated shows page after page with references to laws relating to national organizations and laws. There are "national" parks as distinguished from "state" parks, "national" banks as distinguished from "state" banks, "national" and "state" labor relations boards, "national" and "state" housing administrations. These all show that the word "national" has a distinctive federal meaning.—See Words and Phrases, Volume 28, at pages 21-25.

The word "national" is defined in Volume 65 of Corpus Juris Secundum, at pages 38-39. There it is

stated that the word "national" is an adjective, which means "pertaining or relating to a nation as a whole; commonly applied in American law to institutions, laws or affairs of the United States or its government, as opposed to those of the several states."—65 C.J.S. 38-39.

Bouvier's Law Dictionary, Baldwin's Century Edition (Cleveland, Banks-Baldwin Law Publishing Company, 1940), defines "national" thus: "Belonging to, affecting, or pertaining to, a particular nation: as, national domicile, the national government. Often opposed to State, and nearly synonymous with Federal: as, in national bank (p. v.), or national banking association."

Webster's New International Dictionary, Second Edition (G. & C. Merriam Co., 1950), at page 1629 defines "national". It says: "Of or pertaining to a (or the) nation; common to a (or the) whole nation; * * * Of or pertaining to a politically united people or state (a nation in sense (4)) * * * as, national debt."

POINT TWO.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND THE ORDER, CALLS FOR A PRIVATE NONFEDERAL LABOR DRAFT FOR THE PERFORMANCE OF SERVICES THAT ARE NOT EXCEPTIONAL OR RELATED TO THE NATIONAL DEFENSE, IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It will be conceded that men can be drafted to perform military service, notwithstanding the Thir-

teenth Amendment. But it seems that a very substantial and different question arises here. The Thirteenth Amendment prohibits the President from taking those men and putting them to work for private industry, even engaging in war work, which is not done by the Federal Government. It must be admitted that a soldier cannot be put to work by the Government in a private defense industry. It follows that a conscientious objector may not be ordered to do work for a private employer not engaged in federal work as an agency of the Government. If a soldier cannot be ordered to do private work for a private employer then a conscientious objector cannot be compelled to do such work.

POINT THREE.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES APPELLANT OF DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of American Jurisprudence on "Constitutional Law," requires "* * * that the law shall not be unreasonable, arbitrary or capricious and that *the means selected shall have a real and substantial relation to the object sought to be attained.*" (Italics added.)

It is submitted that inasmuch as the appellant in this case does not consent to the work and since he is ordered to do work that is not in the "national" or

"federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against his wishes, it is plain that he has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

POINT FOUR.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL, IN THAT IT IS AN UNLAWFUL DELEGATION OF LEGISLATIVE AND PRESIDENTIAL AUTHORITY.

That Act provides that the local board shall determine the appropriate work for an inductee. In this regard it provides as follows: "* * * such civilian work contributing to the national health, safety, or interest *as the local board shall deem appropriate.*" (Italics added.)

Where the statute delegating legislative power fails to set forth sufficiently definite standards, the uncontrolled delegation will be held invalid. This was the result reached in the celebrated decision which invalidated the codes of fair competition established by the National Industrial Recovery Act of 1933. (*Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 55 S.Ct. 837; see also *Panama Ref. Co. v. Ryan* (1935) 293 U. S. 388, 55 S.Ct. 241; 24 Cal. L. Rev. 184; 8 So. Cal. L. Rev. 226, 255; 23 Cal. L. Rev. 435.)

POINT FIVE.

THAT THE ORDER MADE BY THE LOCAL BOARD DIRECTING APPELLANT TO WORK IS VAGUE AND INDEFINITE AND PURPORTS TO DELEGATE THE SELECTION OF DUTIES TO BE PERFORMED TO AN AGENCY AND PERSONS NOT AUTHORIZED BY THE SELECTIVE SERVICE ACT OR THE REGULATIONS.

As can be seen by the Act and Regulations, the work must be work of national importance, with the objective of maintenance of national health, safety, or interest. The order however, requires only institutional work with no showing that it has any relation to health, safety, or interest and the order further provides as follows: "You will be instructed as to your duties at the place of employment."

It is obvious that the work ordered must come within the scope intended by the act and regulations, namely, health, safety, or interest. The delegation of authority placed in the employer has no such restriction. It is possible and probable under the order that the work may have no relation to health, safety, or interest of national scope.

ARGUMENT.

POINT ONE.

THE ORDER OF THE LOCAL BOARD REQUIRING APPELLANT TO PERFORM CIVILIAN WORK FOR THE COUNTY OF LOS ANGELES, AND SECTIONS 1660.1 AND 1660.20 OF THE SELECTIVE SERVICE REGULATIONS ARE IN CONFLICT WITH THE SELECTIVE SERVICE ACT, IN THAT THE WORK ORDERED TO BE DONE IS NOT NATIONAL OR FEDERAL WORK, AS REQUIRED BY THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

As stated in the summary of this point, the Act authorizes the ordering of conscientious objectors to perform work contributing to the maintenance of *national health, safety, or interest.* (Italics added.)

The key word is "national" as distinguished from State, County or City; as stated previously the word "national" has a very definite connotation in Federal jurisprudence.

Under "Crimes", 18 U.S.C.A., Section 709, at page 75, it appears that the use of the word "national" is prohibited for all except the federal government. It is a crime to use the word "national" as part of the business or firm name, etc., except as permitted by the laws of the United States. In the 1954 Pocket Parts of 18 U.S.C.A., Section 709, the section is extended to National Housing or Public Housing Administration. The punishment is $1,000.00 fine, imprisonment for not more than one year, or both. Violation may also be enjoined at suit of the United States Attorney.

The annotation shows that the First National Corporation of Boston, a Massachusetts corporation with brokerage powers, is not entitled, by reason of the

inhibitions of former section 583 of Title 12, to use the word "national" in its title. (See 32 Op. Atty. Gen. 473 (1921).) *Byers v. United States,* C. A. Kansas 1949, 175 F. 2d 654, cert. denied 70 S. Ct. 183, 338 U. S. 887, 94 L. Ed. 545, holds that the Courts will take judicial notice of the fact that a bank with the word "national" in its title is one organized pursuant to the laws of the United States.

The word "national" cannot be used as part of the name of any bank unless the bank is chartered under the laws of the United States and Courts take judicial notice of such fact. See *Wedding v. First National Bank,* 133 S. W. 2d 931, 280 Ky. 610 (1939); *First National Bank v. First State Bank,* Tex. Com. App. 1927, 291 S. W. 206.

In the case where a registrant is ordered to work for the state or a state hospital, this is not a national or federal institution. It is, on the contrary, a state institution and not "national" or "federal" work. The work does not pertain to the "national" interest or welfare. It relates exclusively to "local" or "state" welfare. The work's not being in the "national" interest consequently is not that which Congress intended or could constitutionally order to be performed by conscientious objectors.

A reasonable interpretation of the statute by the Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicted thereunder. (*Harrison v. Vose,* 50 U. S. 372, 378.) It has been said that a sensible construction

should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress intended to avoid results of such a character. (*United States v. Kirby,* 7 Wall. 482, 486-487; *United States v. American Trucking Ass'n,* 310 U. S. 534.) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States v. Delaware & Hudson Co.,* 213 U. S. 366, 408.) The argument of the Government requires the Court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts as to such interpretation." *Harriman v. Interstate Commerce Comm'n,* 211 U.S. 407, 422.

If the statute is not interpreted in such a way as to afford the appellant the right to make this defense then grave doubts arise as to the constitutionality of the prescribed forced labor procedure. To avoid such consequences, the interpretation here suggested should be accepted.

POINT TWO.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND THE ORDER, CALLS FOR A PRIVATE NONFEDERAL LABOR DRAFT FOR THE PERFORMANCE OF SERVICES THAT ARE NOT EXCEPTIONAL OR RELATED TO THE NATIONAL DEFENSE, IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The act, as construed and applied, calls for a labor draft for private or nonfederal purposes. This procedure is entirely outside the field of unlimited authority of Congress to raise and maintain an army or provide for alternative service of a civilian nature. The appellant agrees that an examination of the law on this subject will reveal that the Thirteenth Amendment is no ban on the performance of military service. It also does not prohibit alternate civilian work for the Government or work for a federal agency, as in taking over industry by the Government, or work under control of the federal system.

All of the cases where the subject of the performance of civilian work ordered to be done by draft boards has been determined by the courts are not in point here; such do not control here. The cases have been considered under the Thirteenth Amendment as related to work done for the National Director of Selective Service in civilian public service camps—federal agencies. Such camps were not private camps but were federal. (See *United States v. Brooks,* 54 F. Supp. 995 (S.D.N.Y.), affirmed *Brooks v. United States,* 147 F. 2d 134, cert. denied 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188 (1st

Cir.); *Zucker v. Osborne,* 54 F. Supp. 984 (D.C.W.D. N.Y.); *Hopper v. United States,* 142 F. 2d 181 (9th Cir.).) None of these cases involved orders placing a conscientious objector in nonfederal employ or in the employ of private persons. It is seen that there exists here an obvious distinction between the orders under the present law and the work required under the 1940 Act. This is a real and substantial distinction. It is not one without a difference.

It must be admitted that there is no constitutional right of exemption from any kind of work that is within the discretion of Congress and the President to order a conscientious objector to perform. The appellant does not argue that a conscripted conscientious objector has a greater choice of work to perform than a person conscripted for ordinary military service. He does not. They are both on the same level. Neither may set his choice of service up against the discretion of the President acting under a proper law of Congress. The discretion and power of choice as vested in the President by the scope of the war power given to him through the act by Congress are unlimited. The objection here is that the order to do work for a nonfederal agency is not within the scope of the Universal Military Training and Service Act. If it is argued that it is, then it is the appellant's position that Congress does not have authority to conscript labor for a private employer or for a nonfederal project. In other words, the order in this case to perform civilian work is like a labor draft

for private employers. It was not for the performance of service in the war effort of the nation.

There are no cases where the labor draft for private employment has been determined by the federal courts. No federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States v. Brooks,* 54 F. Supp. 995 (S.D.N.Y.), affirmed *Brooks v. United States,* 147 F. 2d 134 (2d Cir.), cert. denied 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188 (1st Cir.); *Hopper v. United States,* 142 F. 2d 181 (9th Cir.); *Zucker v. Osborne,* 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for a private labor for nonfederal agencies.

All of the civilian public service camps were operated at the expense of the Government. They were under the control of General Hershey and subject to

the Selective Service Regulations promulgated by the President. It could not be successfully argued that the Thirteenth Amendment reached labor in such camps. It was alternate conscription service of a civilian nature performed for the Government. It is true that some of the camps were run by religious groups, but they were not privately owned and operated. They were federal camps. They were under federal control. There were elaborate regulations made and published by General Hershey, the Director of Selective Service. The religious camp directors of the different religious camps were acting as agents of General Hershey. They were, therefore, agents of the Government. The conscientious objectors in the camps were, therefore, working for the Government and not for private or nonfederal employers.

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

The compulsory road work law of Florida was held not to violate the Thirteenth Amendment because the services called for were exceptional and akin to the usual compulsory duties that every citizen owed the government. The work was likened to military service and jury duty, which are not forbidden by the Thir-

teenth Amendment. (*Butler v. Perry,* 240 U. S. 328, 333.) The Court said:

> "The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases,* 16 Wall. 36, 69, 71, 72; *Plessy v. Ferguson,* 163 U. S. 537, 542; *Robertson v. Baldwin,* 165 U. S. 275, 282; *Clyatt v. United States,* 197 U. S. 207; *Bailey v. Alabama,* 219 U. S. 219."

A case similar in its holding is *Plessy v. Ferguson,* 163 U. S. 537. That case involved a Louisiana law that provided for separate but equal accommodation for both black and white passengers traveling on railroads in the state. The Court held that the law did not violate any of the rights of a railroad employee convicted under the law. 163 U. S., at pages 542-543.

Mr. Justice Black in *United States v. Petrillo,* 332 U. S. 1, 13, stated that the criminal sanctions of the Communications Act punishing coercion in broadcasting did not violate the Thirteenth Amendment on its face. He indicated that the application of the statute may present the question. Thus it is a question whether it is void as construed and applied.

A New York statute making it a crime for a landlord not to provide usual apartment house services on an equal basis to all tenants did not violate the Thirteenth Amendment. (See *Marcus Brown Holding Company, Inc. v. Feldman,* 256 U. S. 170, 199.) The Court said:

> "It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them."

In *Auto Workers v. Wisconsin Employment Relations Board,* 336 U. S. 245, it was held that the law for collective bargaining between the employer and union did not violate the Thirteenth Amendment. The statute was sustained because it did not make it a crime to quit a job. 336 U. S., at page 251.

In all the cases quoted from above none of them involved services performed for a private person. They all involved forced service of an exceptional or emergency or special nature, to the state.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. Soldiers could not be

put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state institution. The Thirteenth Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

The Court considered this question in *Pollock v. Williams,* 322 U. S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage. (322 U.S. at 8.) The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd v. Hodge,* 334 U. S. 24, at pages 31-32.) Mr. Justice Jackson for the majority of the Court said: "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent

with the general basis system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel." *Pollock v. Williams,* 322 U. S., at pages 17-18.

In the *Slaughter House Cases,* 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery. See 16 Wall., at pages 69, 71-72.

The other peonage cases, like *Pollock v. Williams,* 322 U. S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to a war law. It is fundamental that the Constitution deals with realities and not with shadows. (*Cummins v. Missouri,* 4 Wall. 277, 325; *Ex parte Milligan,* 4 Wall. 2, 120-121.) And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Bailey v. Alabama,* 219 U. S. 219, and *Taylor v. Georgia,* 315 U. S. 25) with *Pollock v. Williams,* 322 U. S. 4.

Hodges v. United States, 203 U. S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the Court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof." 203 U. S., at pages 16-17.

The decisions are agreed in the general rule that encouragement or promotion of specific industrial enterprises carried on by private ownership is not a public purpose for which taxes may be imposed or

public money appropriated. *Citizens Sav. & Loan Assn. v. Topeka,* 20 Wall. 655, 22 L. Ed. 455.

Thus the provisions of the Federal Revenue Act of 1890 providing for bounties to manufacturers of sugar in the United States were held invalid in *United States ex rel. Miles Planting and Mfg. Co. v. Carlisle* (1895) 5 App. D. C. 138, on the theory that since state legislatures had no power to levy taxes for the encouragement of private industries, *a fortiori* the Congress had no such power.

The power of Congress is dependent solely upon the Constitution, and it can exercise only such powers as by that instrument are granted to it, expressly or impliedly. It may not under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government. *Ashwander v. Tenn. Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466, rehearing denied in 297 U. S. 728, 80 L. Ed. 1001, 56 S. Ct. 588. The government may not enact laws in furtherance even of a legitimate end merely because they are useful or because they make the government stronger. There must be some relation between the means and the end. *Carter v. Carter Coal Co.,* 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

It is submitted, therefore, that the order for the defendant to perform work at a state institution and the regulations authorizing such order constitute a construction and application of the statute which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

POINT THREE.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES APPELLANT OF DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of American Jurisprudence on "Constitutional Law", requires "* * * that the law shall not be unreasonable, arbitrary or capricious and that *the means selected shall have a real and substantial relation to the object sought to be attained.*" (Italics added.)

The Court's attention is called to the case of *Ex parte Mitsuye Endo,* 323 U. S. 283. This case held habeas corpus proper to secure the release of a concededly loyal citizen who was being illegally detained by the War Relocation Authority under presidential executive power. The Supreme Court, speaking through Justice Douglas, after calling attention to the constitutional safeguards against improper exercise of the war power, one of these being "due process" under the Fifth Amendment (see page 299), ruled that a concededly loyal citizen presents no problem of espionage or sabotage and since the power to detain is derived from the power to protect the war effort against espionage and sabotage, the detention, which had no relation to that objective, is unauthorized. The force of the reasoning in that case falls upon this case here before the Court.

It is to be noted that the Supreme Court of the United States as early as *Ex parte Milligan,* 4 Wall.

2, 120-121, has held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The *Milligan* case involved the release on habeas corpus of a civilian who had been sentenced to death upon a military trial during the Civil War in the state of Indiana, where federal court trial was available. Compare *Cummins v. Missouri,* 4 Wall. 277, at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless the Supreme Court itself has recognized such presumption will be of no avail where a presidential war order is clearly shown to be arbitrary and repugnant to the Federal Constitution. See *Highland v. Russell Car & Plow Co.,* 279 U. S. 253, at pages 261 and 262.

A Selective Service case deemed worthy of mention on this question is *United States v. Emery* (2d Cir. 1948) 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's leaving detached service "for which he had volunteered." He had previously been hired out as a volunteer laborer from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the Federal Government. Out of his wages he was paid the $15.00 a month Civilian Public Service Camp allowance by the Federal Government. The balance of his wages was paid into a separate fund of the United States Treasury.

The defendant was not a volunteer. The *Emery* case, supra, is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments, had not been violated. The Court at 168 F. 2d 454, page 456, said:

> "* * * The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor."

The language was dictum, since the defendant was in no position to assert the defenses because he had volunteered for the work he later questioned. Had it been without his consent the case would have been different. Also the points on forced labor were not presented in that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as the appellant in this case does not consent to the work and since he is ordered to do work that is not in the "national" or "federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against his wishes, it is plain that he has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

POINT FOUR.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL, IN THAT IT IS AN UNLAWFUL DELEGATION OF LEGISLATIVE AND PRESIDENTIAL AUTHORITY.

Where the statute delegating legislative power fails to set forth sufficiently definite standards, the uncontrolled delegation will be held invalid. This was the result reached in the celebrated decision which invalidated the codes of fair competition established by the National Industrial Recovery Act of 1933. (*Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837; see also *Panama Ref. Co. v. Ryan* (1935) 293 U.S. 388, 55 S.Ct. 241; 24 Cal. L. Rev. 184; 8 So. Cal. L. Rev. 226, 255; 23 Cal. L. Rev. 435.)

A delegation of legislative power to an administrative officer is not brought within the permissible limits of such delegation by prescribing the public good as the standard for the administrative officer's action. *Panama Refining Co. v. Ryan,* 293 U. S. 388.

The use of the words "health, safety, or (public) interest" as being a sufficient guide or standard for public officials has only been recognized in the one instance where it is in the aid of the police powers of a governmental body. The question of police powers is not present here.

POINT FIVE.

THAT THE ORDER MADE BY THE LOCAL BOARD DIRECTING APPELLANT TO WORK IS VAGUE AND INDEFINITE AND PURPORTS TO DELEGATE THE SELECTION OF DUTIES TO BE PERFORMED TO AN AGENCY AND PERSONS NOT AUTHORIZED BY THE SELECTIVE SERVICE ACT OR THE REGULATIONS.

As stated before, it is not contended here that Congress did not have the power to legislate with respect to the use of appellant's services in lieu of becoming a member of the Armed Forces but it is urgently contended that as the act and regulations are construed and applied they are unconstitutional.

It is a cardinal principle of our form of constitutional representative government in which the powers are divided among legislative, executive and judicial departments, that the legislative body cannot delegate its powers to another branch of the government. This principle applies to the President as well as other bodies. It is recognized that each branch of the government may make its rules of proceeding, but always subject to the limitation that they must not ignore constitutional restraints or violate fundamental rights.

Under Section 456(j) of the Universal Military Training and Service Act, 50 U. S. C. App. sec. 456(j) 65 Stat. 83, Congress stated that a conscientious objector, in lieu of induction, can be ordered to perform such civilian work as may contribute to the maintenance of national health, safety, or interest and as the local board may deem appropriate. As pointed out, within the scope of congressional and executive power such work could be ordered. But the regula-

tions, Section 1660.1, attempt to legislate further by providing that such work can be ordered even if it is not for the national health, safety, or interest, by specifically stating that the inductee may be ordered to work for a State, Territory, possession, political subdivision of a state or the District of Columbia.

Congress has no power to legislate with reference to these enumerated bodies nor govern who shall or shall not be employed by them or what kind of work or business shall be carried on by them. Let us assume that in the State of Nevada where gambling is legal that the state maintained one of the gambling halls. Could the conscientious objector be required to work in such an establishment? Section 1660.1, paragraph (1) of the regulations makes no provision for any limitation on the type of work to be performed, but merely states that they may be ordered to work with unrestrained limitation. Under Section 1660.1, paragraph (2) the prospective inductee can be ordered to work for a private corporation which is *primarily* engaged in certain charitable and educational activities. Here again the regulations do not provide that the inductee shall do any specific type of work which would contribute to national health, safety, or interest. The word "primarily" used in the regulations assumes that the organization may engage to a lesser degree in some business which is not connected with maintenance of national, or even local, health, safety, or interest. Let us assume that in the state of Nevada a charitable institution also owns a small gambling establishment, or, as is true, many nonprofit organiza-

tions carry on purely private businesses, such as retail stores. If the inductee is placed in such store can this be considered work of national importance over which Congress has authority to legislate? Certainly not.

It is obvious that the regulations promulgated by the President are an attempt to legislate under the guise of providing rules of procedure which is not permitted by our law.

We may then go a step further and read the order which was made in this case. There appears only a recitation that the appellant has been found acceptable for civilian work contributing to the maintenance of the national health, safety or interest and is assigned to institutional work, Los Angeles County. No limitation on the type of work or duties is set forth in the order. No requirement that the appellant shall in fact do work contributing to the maintenance of the national health, safety or interest. The only thing which appears in the order is the statement that the appellant is to be instructed as to his duties at the place of employment. In other words, the tremendous power to raise and maintain an army under the Federal Constitution was the subject of legislation by the United States Congress who stated that the appellant could be ordered to do only such work as shall be of national importance. This was unlawfully legislated upon again by the President who decreed that the appellant shall do work of local or private importance whether it had any relation to national health, safety, or interest or not. The appellant was then ordered

into the hands of a private employer with the unrestrained power to order such work as in his sole and arbitrary discretion he may deem advisable whether it has any relation to the original intent or not. This we submit is violative of our Federal Constitution in the several respects heretofore pointed out.

CONCLUSION.

The judgment of the Court below is erroneous for the reasons hereinabove set forth. The conviction ought to be reversed and set aside. A judgment discharging appellant ought to be directed to be entered by the trial Court.

Dated, San Francisco, California,
October 25, 1954.

Respectfully submitted,
J. H. Brill,
Attorney for Appellant.

No. 14,452

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY ALLEN NILES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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No. 14,452

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY ALLEN NILES, *Appellant.* vs. UNITED STATES OF AMERICA, *Appellant,*	

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231, and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on January 20, 1954 for, in violation of 50 United States Code Appendix 462(a), failing to comply with the order of his Local Draft Board to report to a place of employment for the purpose of doing civilian work contributing to the maintenance of the national health, safety or interest as provided for in the Selective Service Act of 1948

and the rules and regulations made pursuant thereto (R. 3, 4).

Appellant plead not guilty and was tried by the Court, the Honorable Michael J. Roche presiding, on May 11, 1954 (R. 6, 8). A motion for judgment of acquittal was made and denied by the Court (R. 35). Appellant was found guilty and sentenced to a term of eighteen months on June 17, 1954 (R. 11, 36). Appeal was timely made to this Court from the judgment of conviction (R. 13).

FACTS.

Appellant registered for Selective Service on September 2, 1949 (File 1). On January 8, 1952 appellant was classified I-O (File 13). On October 20, 1952 appellant was informed that Selective Service regulations provided that Class I-O registrants could be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest, and was given an opportunity to volunteer for one of the available positions (File 81). On February 24, 1953 appellant was asked to indicate his preference with respect to three jobs which had been approved for the employment of conscientious objectors (File 90). Appellant informed the Board that he did not wish to perform any of the type of work listed (File 90). He said, among other things, that the wages that are offered are "entirely unsatisfactory they offer less than half of what I am receiving now." (File 93).

Mr. Niles was ordered to report to his Local Board on March 31, 1953 for an interview (File 96). On March 30, 1953 the Local Board received what Appellant termed "statement of my position (File 97-102)." On page three (File 100) of this statement appellant listed four objections to civilian work in lieu of induction:

"(1) it is *un*constitutional, in that it demands that a person be forced into *un*savory occupations, because of a conscientious abhorrence of war."

"(2) The three 'jobs'(?)[1] offered are not as stated in the '*national* health, safety, and welfare' * * *"

"(3) The type of employment offered is insulting to any intelligent person, being occupations for indigents, 'skid-row bums' and mental incompetents."

"(4) The salary offered is also an insult to a person with my training and education * * *"

Appellant summarized his position at Page 5 of this communication (File 102). He stated (1) that he would never voluntarily give up his present classification, (2) that "the 'jobs'(?)[1] offered by the Local Board are entirely unsatisfactory and insulting in type, in place and in salary. And I for one will not be forced into any of those positions come what may" and (3) "The federal government is not giving me anything that I am not paying for, as far as I am scripturally able." Appellant was at that time employed as a lath worker.

---

[1]So written in file.

On March 31, 1953, appellant had an interview before the Local Board (File 104). When asked concerning work as an Institutional Helper in the Department of Charities in Los Angeles, he stated that he did not believe in that type of charity and that "he explained his reasons for refusing the work in his letter that was submitted to the board on March 30, 1953 (File 104)." He stated that primarily "he felt he was being forced into an unsavory job and he saw no value in the jobs offered."

On August 24, 1954 appellant was ordered to report for instructions to proceed to his place of employment for civilian work contributing to the maintenance of the national health, safety or interest, and was assigned to the Department of Charities, 110 North Mission Road, Los Angeles 33, California (File 161). Appellant failed to report for civilian work as directed (File 161). The Local Board, on September 4, 1953, received a letter from appellant in which he stated "I refuse both the job as an Institutional helper in Los Angeles and any subsequent offers of employment by the government in my own city or anywhere else (File 172)."

QUESTIONS PRESENTED.

I. Are the present provisions of the Selective Service Act concerning civilian work for conscientious objectors in violation of the Constitution of the United States?

II. Could the local board constitutionally determine that work at the Los Angeles County Department of Charities was in the national health, safety or interest?

III. Do the cases holding that the 1940 Selective Service Act provisions concerning civilian work for conscientious objectors constitutional apply to the provisions of the present act?

SUMMARY OF ARGUMENT.

I. INTRODUCTION.

The question presented in this case is whether the present Selective Service Act provisions concerning civilian work for conscientious objectors so differ from the provisions under the 1940 Act that the court must re-examine the question of the civilian work program's constitutionality.

II. APPELLANT WAS ASSIGNED TO WORK OF NATIONAL IMPORTANCE.

The fact that the work involved in the instant case benefits the state of California does not necessarily mean that this work does not benefit the United States. Since Los Angeles is a part of the United States, any benefit to it is a benefit to the nation as a whole. Any work in the interest of Los Angeles would, therefore, inure to the benefit and be in the national interest. Appellant, in any event, cannot set himself up as a judge as to what constitutes national importance. That job is one in the discretion of the Selective Service

System and the administrative interpretation should be upheld unless clearly erroneous. The fact that appellant's work would be administered by a subdivision of the state does not mean that the work itself cannot contribute to the national interest. The Selective Service Act authorizes the utilization of state subdivisions in the administration of the act. Such an authorization is not unusual or unconstitutional. The work here involved may be in the national interest in providing full utilization of critical manpower, resources and benefit national and military morale by requiring appellant to be of some use.

III. APPELLANT WAS NOT ORDERED INTO INVOLUNTARY SERVITUDE.

The action of the local board was constitutionally authorized under the war power. Work of a like character has been held not to involve involuntary servitude by the courts under the 1940 Act.

IV. THE ORDER DID NOT DEPRIVE APPELLANT OF DUE PROCESS OF LAW.

The courts have uniformly rejected this argument under the 1940 Act. Appellant has shown no distinction between that Act and the present one causing any prejudice to appellant. On the contrary, under the present Act, pay and conditions of labor are better, and appellant may remain at large instead of being confined to a camp.

V. THE SELECTIVE SERVICE ACT IS NOT UNCONSTITUTIONAL AS AN UNLAWFUL DELEGATION OF POWER.

The delegation under the 1940 Act was not held to be unreasonable. The present act defines the program in much greater detail than that of the Act of 1940 a fortiori. Since the past act was constitutional, the present one is. Furthermore, civilian work under the war power requires a flexible program and lends itself admirably to administration regulation.

VI. APPELLANT WAS NOT ORDERED TO WORK IN A GAMBLING HALL.

Appellant strenuously argues that the present regulations would allow appellant to be assigned to work at a Nevada gambling hall. The fact of the matter is that appellant wasn't. Appellant has no standing to raise this question.

STATUTES AND REGULATIONS.

Section 5(g), Selective Training and Service Act of 1940 (54 Stat. 889)

> "* * * Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction * * *"

Section 456(j), Universal Military Training and Service Act of 1948

"(2) If the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Section 1 (e), Universal Military Training and Service Act of 1948

"The Congress further declares that adequate provision for national security requires maximum effort in the fields of scientific research and development, and the fullest possible utilization of the Nation's technological, scientific, and other critical manpower resources."

Section 10 (b), Universal Military Training and Service Act of 1948

"The President is authorized—(5) to utilize the services of any or all departments and any and all officers or agents of the United States, and to accept the services of all officers and agents of the several States, Territories, and possessions, and subdivisions thereof, and the District of Co-

lumbia, and of private welfare organizations, in the execution of this title;"

Selective Service Regulation 1660.1

"Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof. (b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

ARGUMENT.

I. INTRODUCTION.

Section 6 (j) of the Universal Military Training and Service Act of 1948 provides that conscientious objectors may be ordered by their local board to perform "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate."

The Selective Training and Service Act of 1940 (54 Stat. 889) provides that those classified as conscientious objectors may "be assigned to work of national importance under civilian direction."

Appellant here argues that the Draft Act now in effect, as applied by the regulations and orders of the local board in pursuance thereto, is unconstiutional as applied to him, but apparently concedes that the 1940 Act was constitutional (Appellant's Brief, page 18). Appellant argues that assigning him to work for the Los Angeles Department of Charities puts him in a state of peonage and deprives him of due process of law. He further argues that the Selective Service Act constitutes an unlawful delegation of legislative authority violating the separation of powers principle of our constitution.

The civilian work program in lieu of induction under the 1940 Selective Service Act has been held constitutional by this and many other circuits. *Richter v. United States,* 181 F. 2d 591; *Penor v. United States* (9th Cir.), 167 F.2d 553; *Hopper v. United States* (9th Cir.), 142 F.2d 181; *Atherton v. United States* (9th Cir.), 176 F.2d 835; *Wolfe v. United States,* 149 F.2d

391; *Roodenko v. United States* (10th Cir.), 147 F.2d 752; *Kramer v. United States,* 147 F.2d 756; *Brooks v. United States,* 147 F.2d 134; *United States v. Van Den Berg,* 139 F.2d 654; *United States v. Mroz,* 136 F.2d 221. Under the 1940 Act conscientious objectors were assigned to civilian public service camps. See *Atherton v. United States, supra.* Under the present act conscientious objectors are allowed to remain at large but are required to work in such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate. Regulation 1660.4. The local board is limited by Regulation 1660.1 which provides as follows:

> "(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.
>
> "(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof."

In the present case appellant was assigned finally to work as an Institutional Helper in the Los Angeles Department of Charities (File 161). Appellant claimed that this job was entirely unsatisfactory and insulting in type, in place and in salary (File 102).

Appellant attempts to distinguish the present program of civilian work for the one held valid under the 1940 Act because the 1940 program operated through camps administered by, or at least to some extent dependent upon, the federal government, while appellant's work would be supervised by a subdivision of a state. Appellant claims that the work to which he was assigned was not national or within Congress' power to order.

II. APPELLANT WAS ASSIGNED TO WORK OF NATIONAL IMPORTANCE.

The United States is a federal republic. Its government consists of two spheres of authority—one, of the states, the other, of the national authority as defined and limited by the constitution. The states of the union, however, are not separate islands of interest and concern. The states together comprise the United States of America.

When Rhode Island, the smallest of the states, is injured, not only Rhode Island is injured but also the United States is injured. Rhode Island is a part of the United States just as the arm is part of the body. If the part is injured, the whole is injured. When California increases its wealth and happiness, the United States increases its wealth and happiness. Yosemite Park is within the state of California, yet its beauty belongs to the United States as a whole. When Los Angeles becomes a better place in which to live with less poverty and suffering, the United States, by that much, becomes better and richer.

When one works in the United States to promote health, safety, or interest, that work must benefit a part of the United States before it can benefit the whole. One cannot contribute to the national interest without contributing to the local interests of the place where the contribution is effected. When during World War II conscientious objectors worked on forestry and tree planting projects, they benefited the states in which those activities were carried out as they benefited the national interests. If appellant contributed to the alleviation of suffering in Los Angeles County, he would benefit both the national and the local interest. It is impossible to affect one without affecting the other. There is no place and nothing upon which appellant could work where his efforts could be directed wholly towards the national interest without influencing the interests of some particular state or subdivision thereof.

Perhaps appellant is arguing that the Los Angeles charities are not important enough to be considered national. Appellant, however, is not the person to make this judgment of policy. This Court has held that a Selective Service registrant cannot set himself up as a judge as to what constitutes national importance. *Penor v. United States* (9th Cir.), 167 F.2d 553; See also *Roodenko v. United States* (10th Cir.), 147 F.2d 752. Certainly the alleviation of social problems in Los Angeles would have some effect upon the ability of that city to contribute to a war effort. At least it is not unreasonable for an administrative agency so to find, and an administrative interpretation should be upheld unless clearly erroneous. *Bowles v.*

Seminole Rock and Sand Company, 325 U.S. 410; *F. Uri and Company v. Bowles* (9th Cir.), 152 F.2d 713; *Labor Board v. Atkins Company,* 331 U.S. 398, 403.

Appellant seems to be arguing that if a program is administered by state agencies it therefore cannot contribute to the national interest. However, the federal government has many times utilized state agencies to accomplish federal purposes. The state courts to some extent administer national law. Under the Selective Service Act itself, the President is authorized to utilize the services of all officers and agents of the several states and subdivisions thereof in the execution of the Selective Service law. Section 10(b)(5), *Universal Military Training and Service Act of 1948.* Pursuant to this authorization the Selective Service System has utilized the Los Angeles Department of Charities to accomplish what, in its judgment, is in the national interest. The fact that a bank cannot use the word "national" unless the bank is chartered by United States laws, seems rather irrelevant to the question whether charity for the county of Los Angeles contributes to the national interest.

Congress has declared its purpose in enacting the Universal Military Training and Service Act as, in part, that adequate provision for national security requires the fullest possible utilization of the nation's critical manpower resources. Section 1(e) *Universal Military Training and Service Act of 1948.* Mr. Niles' working for the Los Angeles charities may release a less scrupulous individual for work in making ma-

chines for the common defense. His work might aid the wife, widow or mother who lost her support with the death of one of those young men who are not too conscientious to fight. His work in rehabilitation might return a useful citizen to work in the national interest and forward the defense effort. See *Roodenko v. United States,* supra. It might even be said that appellant's work at a job paying the insignificant sum of $200 a month while living the life of a civilian might benefit the national morale even though his contribution was ever so slight to the national interest. At least the morale of those soldiers who are serving their country for as little as $90 per month might be improved by the knowledge that one who avoided their job was at least required to make some sacrifice, and was not continuing his civilian activities totally unemcumbered by any obligations to his country. See *Brooks v. United States* (2nd Cir.), 147 F.2d 134, where the court, in referring to a civilian work program, said "It is enough that such action may have been considered needed during a great national emergency for its effect upon the morale of those who do serve in the armed forces."

III. APPELLANT WAS NOT ORDERED INTO INVOLUNTARY SERVITUDE.

Congress has the power to draft labor for civilian purposes. *Atherton v. United States,* supra, at 842. The proper maintenance of agriculture, civilian businesses, transportation, sanitation, health and other

civic activities are as essential to the successful prosecution of war and as much a part of the war effort as the production of munitions of war and the arming and equipment of military forces. *Roodenko v. United States,* supra.

Under the 1940 Act all courts have rejected the argument that the constitution did not authorize non-military work and that doing civilian work in the national interest was involuntary servitude. *Wolfe v. United States,* supra; *Weightman v. United States,* 142 F.2d 188, 191; *Brooks v. United States,* supra; *Atherton v. United States,* supra; *Hopper v. United States,* supra. Congress has, under the war power, broad authority to provide for the national defense. As was said in *Hirabayashi v. United States,* 320 U.S. 81, at page 93, "the war power is the power to wage war successfully and is not restricted to the winning of victories in the field; but extends to every matter and activity so related to war as substantially to affect its conduct and progress."

Work in the Los Angeles Department of Charities, as ordered by the Selective Service authorities, is no more involuntary servitude than an order to serve in the Army, Navy or Marine Corps. Congress, in its undoubted authority to provide for the common defense, has determined that appellant's services are necessary to that end. His exemption from service in the armed forces did not extend to a complete exemption from all duty to his country.

IV. THE ORDER DID NOT DEPRIVE APPELLANT OF DUE PROCESS OF LAW.

Appellant's argument that he had been deprived of due process of law by ordering him to accept a lower salary and work which is not as sympathetic to him as that in which he is presently engaged is without merit. The courts have uniformly rejected this argument under the 1940 Act. *Hopper v. United States,* supra. It cannot be said that the difference between the procedure under the 1940 Act and this one operates to appellant's prejudice. The present system allows him to remain at large while the 1940 Act confined him to a camp. Any differences between that act and the present one inure to his benefit. The pay is better and the conditions of labor more nearly that of the average civilian.

Under the Selective Service Act the Selective Service System is allowed to utilize the services of agents of local subdivisions. The use of a county agency is not contrary to the statute. As appellant realizes (Appellant's Brief, page 20) some camps during the 1940 Act were run by religious groups. The fact that under the present act county officers are used seems a distinction without important constitutional difference.

In the present case appellant was ordered to work for the County of Los Angeles which has been appointed pursuant to Section 10(b)(5) of the Universal Military Training and Service Act for the administration of that act. While it is admitted that there are instances in which the presumption of regu-

larity in the exercise of the war power b ythe President may be overcome, it is submitted that appellant has shown no evidence or reason why that action in this case should be held irregular or without the scope of the war power.

V. THE SELECTIVE SERVICE ACT IS NOT UNCONSTITUTIONAL AS AN UNLAWFUL DELEGATION OF POWER.

The 1940 Act contained a simple statement that conscientious objectors were to be assigned to work of national importance. The present act adds considerable detail to the provisions in the 1940 Act while keeping its governing purpose and philosophy. (Compare the two statutes copied in this brief.) In referring to the 1940 Act the Court of Appeals for the Tenth Circuit stated "it was not necessary for the act to define in detail the organization which was to be created. It was sufficient to designate the framework within which it was to be confined." *Roodenko v. United States,* supra. This Court has observed that no practical breakdown as to what would be work of national importance could be written into the Selective Service Act. *Atherton v. United States*, supra; See also *Hopper v. United States,* supra.

It is submitted that no unreasonable delegation of legislative authority has been shown here. It would be impossible for Congress to define every organization in which conscientious objectors might be used for forwarding the national health, safety or interest.

Times and conditions change, and necessarily such a program must be flexible to meet the changing needs of the nation.

VI. APPELLANT WAS NOT ORDERED TO WORK IN A GAMBLING HALL.

Appellant argues strenuously that the act and regulation made thereto could be so interpreted as to make possible ordering appellant to work in a gambling hall. The simple answer to this contention is that appellant wasn't. A litigant can be heard to question the constitutionality of a statute only when and insofar as he at least claims to be damaged by its operation. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450; *Atherton v. United States* (9th Cir.), supra.

Conceivably, there could be some instances where the local boards acted contrary to, or without, or in excess, of the power granted to them by the statute and regulations made in pursuance thereof. The fact, however, that the administrative agency could conceivably exceed its authority has never been an argument for denying agencies authority. Appellant was ordered to work for the Los Angeles Department of Charities. There is no evidence that that organization conducts any other activities besides those of a charitable nature. It was not an unreasonable assumption for the local board in this case to decide that charity is in the national interest. See *Penor v. U.S.* (9th Cir.), supra.

CONCLUSION.

The evidence before the District Court established that appellant refused to work for the government in his own city or anywhere else (File 172). His primary reason was that he felt he was being forced into an unsavory job and he saw no value in the jobs offered (File 104). The inference presented to the District Judge was that appellant considered charity work beneath him because of his ability and training as a lath worker.

The United States submits that appellant has shown no legal excuse for his failure to report for work as ordered, and we, therefore, request that the judgment of the District Court be affirmed.

Dated, San Francisco, California,
December 27, 1954.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
DONALD B. CONSTINE,
Assistants United States Attorney,
Attorneys for Appellee.

No. 14453

United States
Court of Appeals
For the Ninth Circuit.

CALDWELL FINANCE CO.,

Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-29-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BARZEE, LEEDY, KEANE & ERWIN,
American Bank Building,
Portland, Oregon,

For Appellant.

F. BROCK MILLER,
Pittock Block,
Portland, Oregon,

For Appellee.

United States District Court
for the District of Oregon

B-34,121

In the Matter of:

OSCAR HERMAN HERREID,

Bankrupt.

REFEREE'S FINDINGS, OPINION AND ORDER

Caldwell Finance Company claims title to, or a lien on, two used International trucks which have been sold free from liens by the trustee subject, however, to the right of Caldwell to claim the proceeds if its title or lien is found to be superior to that of the trustee in bankruptcy.

The undisputed facts are:

1. Oscar Herman Herreid was adjudged a bankrupt upon his voluntary petition filed on October 19, 1953.

2. At that time, the bankrupt was in possession of one 1950 and one 1951 International pick-up truck, which he had stored for sale on the Richfield Service Station lot in Portland. The bankrupt retained the keys to the trucks and delivered them to the Referee at the first meeting of creditors.

3. On October 21, 1953, notices of the first meeting of creditors were mailed to all creditors of the bankrupt, including Caldwell Finance Company. A few days later, Caldwell Finance Company made a

demand upon the bankrupt to deliver the trucks to it. On October 27, 1953, after the bankrupt and his counsel had advised Caldwell that the trucks were being held subject to the disposition of the bankruptcy court, Caldwell towed the trucks from the lot on which they were stored without the consent or knowledge of the bankrupt or of the person in charge of the lot.

4. On October 28, 1953, Caldwell mailed a registered letter to the bankrupt, as follows:

> This is to notify you we have repossessed your 1951 International Pickup, Motor #SD-220-63303, and 1950 International Pickup, Motor #SD-220-33735, and intend to apply to the Secretary of State for repossession titles in our name.
>
> Pursuant to the terms of the contract, and the laws of the State of Oregon, the pick-ups will be held a short time, and then be sold. Any deficiency will be collected from you.
>
> We take this step with reluctance, and do not intend to preclude further negotiation for the payments on your contract.
>
> Very truly yours,
>
> CALDWELL FINANCE COMPANY,
>
> By /s/ DON TAYLOR.
> Don Taylor.
>
> Registered.

5. These acts upon the part of Caldwell were in direct contravention of the Bankruptcy Act and could be made the subject of contempt proceedings. In re Swofford, 112 F. Supp. 893.

6. The facts leading up to Caldwell's claim to the trucks are: On November 5, 1952, the bankrupt executed and delivered to Caldwell a chattel mortgage for $2,600 upon a certain Mack Diesel tractor owned by the bankrupt and valued at $5,500. This mortgage was duly recorded. In June, 1953, the bankrupt paid Caldwell $100 plus accrued interest on the mortgage. In July, 1953, with the consent of Caldwell, the bankrupt traded the Mack tractor to the International Harvester Company for five used trucks.

7. Two trucks were sold immediately and $500 was paid to Caldwell Finance Company, leaving a balance owing of $2,000. To secure this balance, there was delivered to Caldwell the following documents:

(1) Bills of sale executed by International Harvester Company conveying to the bankrupt and Caldwell Finance Co. the two International trucks and one Ford Flatbed truck. In each bill of sale the International Harvester Company warranted the title to be free from encumbrances "except a lien in favor of Caldwell Finance Co."

(2) The certificates of title on the three trucks with the name of the bankrupt as transferee inserted on the back of each certificate.

(3) A contract of conditional sale, which on its face was drawn between the International Harvester Company and the bankrupt. The bankrupt had signed this contract, but it was not executed by the International Harvester Company. This company refused to execute the contract or to assign it to Caldwell Finance Company. The three trucks were described in the printed form of conditional sale contract. Also inserted was the contract price of $2000, payable at the rate of $100 per month with interest at 10% per annum.

8. On August 5, the bankrupt sold the Ford Flat-bed truck for $800 and turned the money over to Caldwell, leaving a balance owing Caldwell of $1,200. The applications for the transfer of the certificates of title on the two International trucks had not been signed by the bankrupt. Caldwell produced the two certificates at the first meeting of creditors and they were signed on the back by the bankrupt at that time to enable the trustee to proceed with the sale and transfer of the trucks.

9. Returning now to the date of bankruptcy, we find the bankrupt in possession of the two trucks which he is endeavoring to sell. Caldwell Finance Co. had in its possession the documents above described to secure the payment of the balance of $1200 owing on the bankrupt's note in the original amount of $2600. Caldwell never actually owned the two trucks and never had possession of them for purposes of sale.

Discussion of Law and Facts

The most that Caldwell can claim is that it had an informal contract of conditional sale on the trucks, and held possession of the unregistered certificates of title to secure the payment of the balance on the bankrupt's note. These documents had been accepted by Caldwell as security in lieu of the duly recorded chattel mortgage on the Mack Diesel tractor.

Every mortgage, conveyance or instrument intended as a mortgage of personal property, which is not accompanied by immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which is not recorded or filed as provided in ORS 86.350 and 86.370, shall be void as against subsequent purchasers in good faith and for a valuable consideration, of the same personal property or any portion thereof. ORS 86.420.

The trustee in bankruptcy has the status of an attaching creditor. ORS 29.150 provides that from the date of the attachment the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached.

In Kliks v. Courtemanche, 150 Or. 332, the defendant sold and delivered to Phelps on open account a mower. Some months later defendant obtained a title retaining note from Phelps for $277.72, of which $105 represented the purchase

price of the mower. The remainder of the note represented various items, including an open account and small deficiencies owing on other equipment previously sold to Phelps. The plaintiff held a duly recorded chattel on the mower and other equipment in dispute. In holding against the defendant, the Supreme Court said:

> "In view of all the facts and circumstances in this case, we are constrained to hold that by the instrument of December 5, 1931, the defendant did not retain title to the property sold by him to Phelps and that the most which can be claimed for that instrument is the effect of an unrecorded chattel mortgage. It was ineffectual to protect the defendant as against the recorded lien of a bona fide mortgage, such as plaintiff held.
>
> "We are unwilling to extend our conception of what may constitute a conditional sale contract to include the transaction between Phelps and the defendant culminating in the execution of the instrument of December 5, 1931. Conditional sale contracts are affected with secretiveness by nature, and their function can be much abused.
>
> "They should not be employed to displace chattel mortgages which to afford protection to the mortgage must be recorded."

See also the discussion of the law pertaining to the rights of a trustee in bankruptcy in First Na-

tional Bank v. Wegener, 94 Or. 318, and Teshner v. Roome, 106 Or. 393. These cases are distinguishable upon the facts from the case before the referee in that the holders of the unrecorded chattel mortgages had obtained possession of the chattels prior to bankruptcy.

From the discussion of the law and the facts the conclusion naturally follows that Caldwell holds certain documents as security which must be construed as an unrecorded chattel mortgage which is void as to the trustee in bankruptcy.

Therefore, It Is Ordered, Adjudged, and Decreed that the title or lien claimed by Caldwell Finance Co. in the two International pick-up trucks is inferior to the title of the trustee in bankruptcy and that Caldwell Finance Co. is not entitled to the proceeds of the sale except insofar as it may participate in the distribution with other creditors.

Entered at Portland, Oregon, April 10, 1954.

/s/ ESTES SNEDECOR,
Referee in Bankruptcy.

Copies mailed to:

Ward H. Erwin,
American Bank Building,
Portland, Oregon.

F. Brock Miller,
Pittock Block,
Portland, Oregon.

[Endorsed]: Filed April 10, 1954.

Bill of Sale

Know All Men by These Presents:

That in consideration of One and no/100 Dollars ($1.00) and other valuable consideration, the receipt whereof is hereby acknowledged, the undersigned (seller) does hereby sell, transfer and deliver unto Oscar H. Herreid & Caldwell (buyer) his right, title and interest in and to the following described vehicle:

Make: International.

Serial Number: 27966.

Year Manufactured: 1951.

Engine Number: SD220-63303.

Body Type: Pickup.

Model Number: L-110.

The said seller hereby warrants that he is the lawful owner of said vehicle: that it is free from all liens and incumbrances except lien* in favor of

Caldwell Finance Co.,
311 E. Burnside St., Portland, Oregon;

that he has the right to sell the same as aforesaid, and that he will warrant and defend the title of same against the claims and demands of all persons whomsoever except lienholder noted above.

---

*If no lienholder shown in this space the Dept. of Motor Vehicles will assume title is clear.

Signed this 15th day of July, 1953.

Signature of Seller:

INTERNATIONAL HARVESTER COMPANY.

/s/ R. W. GRANT,
635 N.E. 2nd Avenue,
Portland, Oregon.

Subscribed and sworn to before me this ..... day of ....., 19.....

[Endorsed]: Filed April 29, 1954.

NAME Oscar H. Herreid — DATE CONTRACT 11-5-52

ADDRESS 3121 N.E. 57th

Mur. 7449

PAYMENTS DUE DATE	PAYMENTS DUE AMOUNT	PAYMENTS MADE ON ACCOUNT DATE	AMOUNT	BALANCE	CHARGES	REMARKS
				2600.00		
~~5-5-53~~	2600.00	6-3	100.00	~~2500.00~~	10%	
7/5		7-15	500.00	2000.00		
		8-3	800.00	1200.00		
						Stolen 2-9-15-2-9-24 3-9-29
51 Int Pkp 600.						
50 Int 600.						
~~50 Ford Tr. 600.~~				~~Int 159.50~~		Pd 7-15-53
				~~Int 32.~~		" 9-15
					20.—	11-15
				1220.—		7-15
						Will pay 100.—
				15.00	Battery	
				2.00	Keys	
10-27-53	Refused to give Keys to Pl.					
	Rep. both pickups.					
						1/2 Year Lease

DEALER

CAR ~~Mack brk. YEAR 1949~~

LICENSE No. T 29157

MOTOR No. NHB75562

SERIAL No. LH2D1082D

SELLING PRICE

INITIAL PAY.

BALANCE 2600.00

No. MONTHS 1

INS. COMPANY Furnished

INS. DEALER Mr. Isby

FIRE AND THEFT Only

COLLISION

P. D. P. L.

V S L. EMBEZ.

EXPIRATION DATE

PLEDGED TO -0-

12

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 HERREID Oscar H 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

NAME Oscar H. Herreid | AGE | WIFE'S NAME | NUMBER CHILDREN 5

RESIDENCE ADDRESS 3121 N E 57th | HOW LONG THIS ADDRESS | YEARS | MONTHS

PREVIOUS RESIDENCE ADDRESS | HOW LONG THIS ADDRESS | YEARS | MONTHS

RENT OR OWN HOME? | IF NOT GIVE LANDLORD'S NAME AND ADDRESS

EMPLOYED BY | ADDRESS | HOW LONG

FORMERLY EMPLOYED BY | ADDRESS | HOW LONG

IF OPERATING OWN BUSINESS STATE NAME AND TYPE | ADDRESS | HOW LONG

RESIDENCE TELEPHONE | BUSINESS TELEPHONE | SALARY APPROX.

CARRY BANK ACCOUNT WITH | ADDRESS

BUSINESS REFERENCES (THREE FIRMS WITH WHOM YOU DO BUSINESS)

See old app

NAME | ADDRESS

NAME | ADDRESS

NAME | ADDRESS

NAMES OF FATHER AND MOTHER. IF LIVING; IF NOT TWO NEAREST RELATIVES

NAME | ADDRESS

NAME | ADDRESS

PURCHASED LAST CAR FROM | FINANCE CO.

LODGE AFFILIATIONS

LIFE INSURANCE CO., INSURANCE WITH

REMARKS

File mult. County Tire only

U S Natl
Sandy Branch

CONTRACT	2	600	00
#3832 CHECK	1	589	50
#3831 CHECK	1	010	50
CASH			
INSURANCE			
RESERVE			
HOLD BACK			
REC. FEES		Collect filing Fees	
NET			

CONDITIONAL SALE CONTRACT

14 OREGON

THIS CONTRACT, entered into in duplicate this 15 day of July 1933 by and between International Harvester Co. the party of the first part (hereinafter called the Seller) and Oscar H. Herreid of, party of the second part (hereinafter called the Purchaser).

WITNESSETH: The Seller agrees to sell, and the Purchaser agrees to buy on a time price basis the following described personal property, equipped with standard attachments and equipment, delivery and acceptance of which is hereby acknowledged by Purchaser, to-wit:

FOR VEHICLES

Model Year	Trade Name	Type of Body if Truck, State Tonnage	Motor No.	Serial No.	State License Number	New or Used	No. of Cyls.
31	[illegible]	[illegible]	50 220-63303				
30	[illegible]	[illegible]	50 220 33735				

The following special attachments and equipment attached thereto: 98 MT. H. 04637

Radio, Ser. No. ; Heater. (make) (make)

Schedule of Payments

AMOUNT	MONTH	DAY	
100.00	on	May 1st	1934
	on		1935
	on		1936
	on		1937
100	on		1938
	on		1939
	on		1940
	on		1941
	on		1942
	on		1943
	on		1944
	on		1945
	on		1946
Interest	on		1947
10%	on the	day of	1948

[illegible] month, after the date of the last payment above specified, for months

together with such other sums as are hereinafter provided for. Entire contract consists of 3 pages

Payments of [illegible] each

[illegible] the time of repossession and hold the same for Purchaser without any responsibility or liability on part of Seller. The Seller may resell said property at public or private sale, without demand for performance, with or without notice to the Purchaser (if given, notice by mail to address in Purchaser's statement being sufficient), with or without having such property at the place of sale, and upon the terms and in such manner as the Seller or his assigns may determine, and the Seller or his assigns may bid at any public sale. From the proceeds of any such sale the Seller or his assigns may deduct all expenses for retaking, repairing, keeping and selling such property including a reasonable attorney's fee, and also including any amount or amounts paid by Seller to satisfy taxes and/or liens against said property. In case the net proceeds from such sale, added to the payments theretofore made by the Purchaser hereunder, do not cover the total payments required to be made by the Purchaser under this contract, the Purchaser hereby agrees upon demand to pay such deficiency with interest thereon from the date of such repossession, at the rate of 10 per cent per annum. Upon repossession by Seller, all payments shall be retained by Seller as compensation for use, damage and depreciation of said motor vehicle. Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently, and such action shall not operate to estop or prevent the Seller from pursuing any further remedy which he may have hereunder, and any repossession or retaking of the property by Seller pursuant to the terms hereof shall not operate to release the Purchaser until full payment has been made in cash. Seller may take possession of any other property in the above described motor vehicle at the time of repossession and hold the same temporarily for Purchaser without liability on the part of the seller. All rights and remedies hereunder are cumulative and not alternative.

8. The Seller may assign and transfer his rights under this contract without notice to Purchaser and any such assignment, whether merely for purposes of security or otherwise, shall vest in the assignee of the Seller all of the rights hereby reserved and granted to the Seller, together with title to said property, and in such event wherever the word "Seller" is used herein it shall be taken to mean "his assigns," and all payments required to be made hereunder by the Purchaser shall be paid in full to such assignee, without recoupment, set-off, or counter-claim of any sort whatsoever, and the Purchaser shall be estopped to deny as to such assignee any of the statements contained in this contract, or to allege that any or all representations made by the Seller which are not contained in this contract.

9. Possession of said property shall give the Purchaser no title or interest therein and no rights except as herein provided. Time and each of its terms, covenants and conditions are hereby declared to be of the essence of this contract, and acceptance by the Seller of any payment hereunder, after the same is due, or the acceptance of a partial payment shall not constitute a waiver by him of this or any other provision of this contract.

10. Should the Purchaser fail to make any payment herein required when due, the Seller may refer the matter of the collection of such delinquent installments to any person or collection agency or to the collection department of the Seller for collection, and if the same be referred, the Purchaser agrees to pay to the Seller a reasonable collection charge, which shall in no event be less than two per cent of said delinquent installment.

11. It is understood and agreed that there is no representation or warranty that the "year model" of said property as hereinbefore stated, correctly states the year in which said property was manufactured, but is merely used for convenience in describing it. Purchaser agrees to inspect said property and allow inspection thereof at any time upon demand of the Seller, and to notify the Seller of any change of his address, and should the Purchaser fail so to do he shall be liable for any costs incurred by the Seller in locating the Purchaser or the property, payment of which shall be made by the Purchaser on demand. And there are no warranties, express or implied, representations, promises or statements which have been made by the seller to the purchaser, unless written upon or attached hereto.

12. This contract is executed in duplicate, of which, concurrently with the execution thereof, one (1) copy is delivered to the Seller and one (1) copy is delivered to the Purchaser, and the receipt of a copy of this contract is hereby acknowledged by the Purchaser. This contract shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, subject, however, to the above restriction against assignment by the Purchaser. If for any reason any clause or provision of this agreement shall be held invalid, then the remaining clauses and provisions thereof shall be and remain in full force and effect nevertheless. Wherever in this agreement the singular is used it shall be deemed to include the plural and the masculine gender shall be deemed to include the feminine and neuter. Seller is authorized to correct patent errors in this contract.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written at

Portland, Oregon.

International Harvester Co.
Seller Sign Here

By Title

Purchaser Sign Here

for the following payments: in cash $

automobile traded in $ upon the signing of this contract, receipt of which is hereby acknowledged, and the further payments indicated in the adjoining Schedule of Payments, payable in lawful money of the United States of America with interest thereon after maturity, in like lawful money, at the rate of 10 per cent per annum, payable monthly, and if the services of an attorney be required for the enforcement of any of the obligations of the Purchaser or the rights of the Seller, either by suit or action or otherwise, the Purchaser agrees to pay Seller's reasonable attorneys' fees.

It is hereby stipulated and agreed by and between the Seller and the Purchaser that the following are the conditions under which the above described property is to be sold and purchased:

1. Title to said property shall not pass to the Purchaser until all payments hereunder, including collection charges, if any, and all charges for repairs, liens, taxes, supplies, parts and storage on said property up to the time this contract terminates are fully paid in cash. That no transfer, renewal, extension or assignment of the contract, or of any interest thereunder, or injury to or loss or destruction of said property shall release the Purchaser from his obligation hereunder. That the Purchaser shall keep said property free from all liens, taxes and encumbrances, shall not use same or permit it to be used illegally, improperly, or for hire or in any race or speed contest, shall not remove same from the State of Oregon without Seller's written permission, shall not transfer any interest in this contract or in said property, shall not make any material change in the chassis, body or special equipment without Seller's written consent, and Purchaser shall keep said property insured in Seller's favor in a company or companies selected by Seller against fire, theft, collision, confiscation, wrongful conversion and such other forms of insurance and in such amounts as Seller may require, and the Purchaser agrees to pay the premiums therefor upon demand, and that any insurance collected by Seller may be applied, at Seller's option, to the repair and restoration of said property or upon the indebtedness of the Purchaser, and Purchaser assumes all risks of damage to or loss or destruction of said property, whether insured against or not, and Purchaser agrees to repay the Seller, on demand, any payments made by Seller for or on account of said property or of any charges against the same during the life of this contract.

2. Time is of the essence of this contract and should the Purchaser fail or neglect to comply with any term or condition of this contract, or to make any payment provided for herein, when due, or violate any of the provisions hereof, or should the Purchaser become financially involved, or if the Seller should feel insecure or deem the property in danger of seizure or confiscation, or in case of any unusual or unreasonable depreciation in the value thereof, the Seller at his option, and without notice to the Purchaser, may declare the whole amount unpaid hereunder immediately due and payable, without notice to the Purchaser. Upon any such default, the Seller or any officer of the law may take immediate possession of said property, including any equipment or accessories thereto without legal process, without demand (possession after default being unlawful), and for this purpose the Seller may enter upon the premises where said property may be and remove the same. Seller may take possession of any other property in above described motor vehicle

[Title of District Court and Cause.]

ORDER AFFIRMING ORDER OF REFEREE

This matter coming on upon Petition of Caldwell Finance Company for a review of that certain Order of Estes Snedecor, Referee in Bankruptcy, entered herein on April 10, 1954, and upon the Certificate of the Referee certifying said matter for review, and it appearing to the Court that the only question presented was whether the Referee erred in finding that the alleged conditional sales contract claimed by Caldwell Finance Company was in the nature of an unrecorded chattel mortgage to secure the balance due on a note previously executed by the bankrupt in the original sum of $2,600.00, and it appearing to the Court that the facts are undisputed and are as set forth in the Findings of the Referee contained in said Order of April 10, 1954, and the Court adopts said Findings, and it appearing that said Caldwell Finance Company did not have a valid conditional sales contract but had a Bill of Sale in favor of itself and said bankrupt which said Bill of Sale was in the nature of a chattel mortgage, and which chattel mortgage was not recorded in accordance with the Recording Acts of the State of Oregon and, therefore, said mortgage is void as against the trustee in bankruptcy, and that said trustee held the trucks in question free and clear of any claim or lien of said Caldwell Finance Company, and, therefore, the Order of said Referee should be affirmed, it is, therefore,

Ordered, Adjudged, and Decreed, that the Order of the Referee herein dated April 10, 1954, be and the same is hereby approved and confirmed, and it is further

Ordered, Adjudged, and Decreed, that the title or lien claimed by Caldwell Finance Company to the two International Pick-up Trucks herein is inferior to the title of the trustee in bankruptcy, and that Caldwell Finance Company is not entitled to the proceeds of the sale except insofar as it may participate in the distribution of other creditors, and it is further

Ordered, Adjudged, and Decreed, that said trustee in bankruptcy shall hold said trucks free and clear of any claim or lien of said Caldwell Finance Company.

Dated this 1st day of June, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Caldwell Finance Company hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order entered in this matter on the 1st day of June, 1954,

whereby the Order of the Referee in Bankruptcy entered herein on April 10, 1954, was approved and confirmed.

BARZEE, LEEDY, KEANE
& ERWIN,
Attorneys for Appellant,
Caldwell Finance Company.

[Endorsed]: Filed June 30, 1954.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents, consisting of Certificate of Referee on Petition of Caldwell Finance Co. for Review of Referee's Order of April 10, 1954; Petition to Sell Free and Clear of Liens dated November 19, 1953; Order to Show Cause dated November 19, 1953; Order Authorizing Sale Free and Clear of Liens dated November 30, 1953; Report of Sale and Petition to Confirm Sale dated December 8, 1953, with affidavits of mailing attached; Order Confirming Sale dated December 8, 1953; Trustee's Memorandum dated December 10, 1953; copy of Claimant's Memorandum; Referee's Findings, Opinion and Order dated April 10, 1954; Petition to Review Order of Referee with copy of Referee's Findings, Opinion and Order attached;

Bill of Sale dated July 15, 1953; Contract Card; Conditional Sales Contract; Order Affirming Order of Referee dated June 1, 1954; Notice of Appeal; Cost Bond and Designation of Record, constitute the record on appeal from an order of said Court in a certain bankruptcy cause therein numbered B-34121, In the Matter of Oscar Herman Herreid, in which Caldwell Finance Co. is appellant and Samuel A. McAllister, trustee of the estate of Oscar Herman Herreid, bankrupt, is appellee; that the said record has been prepared by me in accordance with the designation of record filed by the appellant, and in accordance with the rules of this Court.

I further certify that the cost of filing the notice of appeal is $5.00 and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said district, this 23rd day of July, 1954.

[Seal] F. L. BUCK,
Acting Clerk.

By /s/ E. W. DAVIS,
Deputy.

[Endorsed]: No. 14,453. United States Court of Appeals for the Ninth Circuit. Caldwell Finance Co., Appellant, vs. Samuel A. McAllister, Trustee in Bankruptcy of the Estate of Oscar Herman Herreid, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed July 26, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals

No. 14,453

In the Matter of:

OSCAR HERMAN HERREID,

Bankrupt.

DESIGNATION OF RECORD AND POINTS

Come now Caldwell Finance Co. and Samuel A. McAllister, trustee, the parties hereto, and jointly designate for printing the following portions of the record:

1. Referee's Findings, Opinion and Order, omitting title of Court and cause.

2. Bill of Sale dated July 15, 1953, from International Harvester to Caldwell and Herreid.

3. Contract Card of Caldwell Finance Company.

4. Conditional Sales Contract dated July 15, 1953.

5. Order of the District Court affirming the Order of Referee, said Order being dated June 1, 1954.

6. Notice of Appeal.

7. Clerk's Certificate.

Point of Appeal on Which Appellant Will Rely

The Referee and the District Court erred in finding that the alleged conditional sales contract

claimed by Caldwell Finance Co. was not a valid conditional sales contract but rather was in the nature of an unrecorded chattel mortgage to secure the balance due on a note previously executed by the bankrupt to said Caldwell Finance Co., and hence was invalid against the trustee.

Dated this 13th day of September, 1954.

/s/ WARDE H. ERWIN,
Of Attorneys for Appellant.

/s/ F. BROCK MILLER,
Of Attorneys for Respondent.

[Endorsed]: Filed September 13, 1954.

No. 14453

United States Court of Appeals

For the Ninth Circuit

CALDWELL FINANCE CO.,

Appellant

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt.

Appellee

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANT

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No. 14453

United States Court of Appeals

For the Ninth Circuit

CALDWELL FINANCE CO.,

Appellant

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt.

Appellee

Appeal from the United States District Court for the District of Oregon

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BRIEF OF APPELLANT

STATEMENT OF PLEADINGS AND FACTS UPON WHICH JURISDICTION IS BASED

On October 19, 1953, Oscar Herman Herreid was adjudicated a bankrupt and subsequently a Trustee was appointed.

The Trustee caused an order to be served on

Caldwell requiring him to appear and show cause why two certain International Trucks (One 1950 Model and one 1951 Model) should not be sold free and clear of encumbrance.

With the consent of both the referee and the claimant the trustee was permitted to sell the vehicles with the right reserved to Caldwell to claim the proceeds in the event his right was determined to be superior to that of the Trustee in bankruptcy.

To facilitate this procedure Caldwell surrendered to the Trustee the title certificates held by him.

After the referee in bankruptcy held the Trustee's title was superior to that of Caldwell Finance Co. Caldwell petitioned the United States District Court for the District of Oregon for a review of the order of the Referee in Bankruptcy.

The Referee certified the matter to the United States District Court for the District of Oregon, for review and that court entered its Order affirming the order of the Referee in Bankruptcy (Tr. p. 15).

From the order of the District Court the petitioner appeals. (Tr. p. 16.)

Jurisdiction of the Court below is based upon the Congressional Act of July 1, 1898, C 541, Sect. 2, 30 Stat. 545 as amended. Title 11 USCA Section 11.

Jurisdiction of this Court is based upon the Congressional Act of July 1, 1898, C 541 Sect. 24, 30 Stat. 553 as amended. Title 11 USCA Section 47.

STATEMENT OF THE CASE

By agreement of counsel only one question is presented for review by this court.

> "Was the interest of Caldwell Finance Co. in two International Trucks superior to that of the Trustee in Bankruptcy."

The facts are undisputed and a. .

Caldwell held a recorded chattel mortgage on a Mack Truck owned by the bankrupt Herreid, which secured a debt of $2500.00.

On July 15, 1953, Herreid desired to trade the Mack Truck to International Harvester Co. for five used trucks. Caldwell consented to the trade.

Two of the five trucks were immediately sold and $500.00 was paid to Caldwell reducing his mortgage to a balance of $2000.00. These two trucks were not included in the bill of sale or conditional sales contract involved in this case.

The remaining three pieces of equipment were covered by bills of sale (Tr. p. 5, para. 7 (1)). Exhibit (Tr. p. 10) was the identical form used for the three trucks remaining.

Three certificates of title and the three bills of sale were delivered by Herreid to Caldwell covering each of the three vehicles and held by him continuously until voluntarily surrendered to Trustee under the agreement for sale.

At the same time (July 15, 1953) Herreid executed a certain conditional sale contract (Tr. p. 14).

Subsequently, the Ford truck was sold leaving

the question of priority as to the two International trucks only.

CONTENTION OF PARTIES

The trustee contends he is entitled to the trucks free and clear of any lien of Caldwell Finance, and that Caldwell should be construed to be a general creditor in the bankruptcy.

Caldwell contends that he is a secured creditor entitled to his preference.

SPECIFICATIONS OF ERROR RELIED UPON

Appellant contends the lower court erred in affirming the findings of the referee holding that appellant was a general creditor in bankruptcy.

SUMMARY OF ARGUMENT

Appellant contends that the intentions of the parties govern and that where the intention is clear to give a conditional sale contract that intent will be given effect and the general creditors will not be permitted to secure the benefit of a windfall

which was never intended at the expense of a creditor who was secured.

ARGUMENT

The law in many jurisdictions construes conditional sales contracts to be chattel mortgages and requires recording. This is not the rule in Oregon. A conditional sale in Oregon need not be filed or recorded (Meier & Frank Co. v. Sabin, 214 F. 231, 130 C.C.A. 605).

In Oregon conditional sales contracts are given effect in accordance with the intent of the parties. (Kliks v. Courtemanche, 150 Ore. 332 at page 341 quoting 11 C. J. 412, Manley Auto Co. vs. Jackson, 115 Ore. 396 at 399, 237 Pac. 982.)

It is conceded if the intent of Caldwell and Herreid was that a chattel mortgage be created, then the ruling of the lower court was correct and this appeal should be dismissed. If the intent was that a conditional sale be created, the ruling of the lower court should be reversed with instructions to order the referee to pay to petitioner (Caldwell) the proceeds from the sale of the trucks.

We quote the Oregon rule as stated in the Kliks v. Courtemanche case, supra p. 341:

> "Whether a transaction constitutes a chattel mortgage or a conditional sale depends on the intention of the parties which must be ascertained from their conduct and the attendant circumstances as well as from the terms of the agreement."

Under this rule, we must look to:

1. The conduct of the parties —
2. The attendant circumstances —
3. The terms of the agreement.

We will examine these three points in the light of the undisputed and admitted facts:

1. **The conduct of the parties.**

Herreid

Herreid desired to trade a Mack truck for five used trucks. The Mack truck was encumbered by a mortgage held by Caldwell. In order to make the trade, the Mack Truck had to be clear, and Herreid requested that Caldwell release his mortgage.

Caldwell

Caldwell agreed to the release of the chattel mortgage which was duly recorded under an agreement that two of the trucks would be sold and $500.00 paid on the amount due Caldwell and on the further agreement that International Harvester would execute a conditional sale contract on the remaining three pieces showing a balance due in the same amount as Caldwell's balance then due from Herreid, and that the conditional sales contract be assigned to Caldwell.

Said sale contract showing International Harvester as seller and Herreid as buyer which Herreid signed (Tr. p. 14). When the conditional sale contract which was to be signed by International was presented to it for signature, they advised that their regulations prevented the signing of such forms unless the contract was being financed through its own financing agency but did execute bills of sale for each piece of equipment to both Caldwell and Herreid and delivered the certificates of title to Caldwell with Herreid's consent.

Herreid voluntarily surrendered and delivered

to Caldwell all of the documents pertaining to the title to the vehicles — 1—certificates of title; 2—bills of sale; 3—original copy of the conditional sales contract. These are all consistent only with intent to create the ownership in Caldwell, subject only to Herreid's interest in the vehicles under his conditional sales contract which he delivered to Caldwell.

Payments were not intended to be and were never made to International Harvester.

2. **The attendant circumstances.**

It must be remembered that Caldwell had a valid prior chattel mortgage on another piece of equipment. Caldwell knew of the recording statutes of Oregon because it had recorded the previous chattel mortgage which it held on the Mack truck owned by the same bankrupt, and would surely have recorded the sales agreement if the parties had intended that it was to stand as a chattel mortgage.

It must be assumed that the parties deliberately chose the form of instrument which they did when

the conditional sales contract was signed and that they intended to be bound by its terms. The Oregon law so provides.

Section 46.360 (3) O. R. S. provides that a jury is bound to find according to the presumption unless overcome by other evidence. There being no other evidence, the following presumption is applicable.

"A person intends the ordinary consequences of his voluntary act."

As between the parties to the contract, Caldwell and Herreid, there can be no question but what it was originally intended by both Caldwell and Herried that International should sell the vehicles to Herreid under the conditional sale contract which would then be assigned to Caldwell. This is demonstrated by the typed signature of International Harvester on the conditional sale contract. If this had been done, the trustee would have raised no objection.

When International refused to execute the agreement because it had its own financing agency,

the parties then agreed that title should go to Caldwell who would become the conditional seller.

The parties themselves intended and did transfer the titles to Caldwell who then stood in the place of International Harvester.

It is true that Caldwell at the time of the bankruptcy had not substituted its name for the typed name of International Harvester, but this is unimportant since equity "will regard that done which ought to be done," and a person is authorized to complete the blanks in a document in accordance with the intent of the parties (Norman Thiex Inc. v. General Motors Acceptance Corp. 259 N. W. 855).

3. **The terms of the agreement.**

The terms of the agreement are consistent only with a conditional sale contract.

Paragraph one of the agreement (Tr. p. 14) provides that title should not pass to purchaser (Herreid) until all payments . . . are fully paid in cash.

This provision in a conditional sale contract has been held to be inconsistent with passage of

title by absolute sale and complete delivery of possession with a bare mortgage back. (McKaig v. Commercial Credit Co., 126 F. 2d 68.)

In paragraph 4 of the agreement, the question of title is again set forth as follows:

> "Possession of said property shall give the purchaser no title or interest therein and no rights except as herein provided."

The court will enforce the terms of the conditional sales contract as agreed on between the parties. (Wickwire v. Hanson, 133 Ore. 85, 288 P. 404.)

CONCLUSION

From the foregoing, it must conclusively follow that the parties intended to create a conditional sales contract, and the intention of the parties govern.

It is conceded that an unrecorded conditional sales contract is valid as against a trustee in bankruptcy.

Since the parties intended to and did create a

conditional sales contract and since an unrecorded conditional sales contract is valid in Oregon as against a trustee in bankruptcy, it conclusively follows that Caldwell should not be deemed to be a general creditor in bankruptcy.

Such a ruling would be unjust and inequitable. The bankruptcy courts are courts of equity, and are guided by equitable doctrines and principles. (U. S. Supreme Court Digest, Section 25, p. 159 citing Securities & Exchange Comm. vs. U. S. Realty and Improv. Co., 310 U.S. 434, 60 S. Ct. 1044, 87 L. ed. 1293 and American United Mut. L. Ins. Co. vs. Avon Park, 311 U.S. 138, 61 S. Ct. 157, 136 ALR 860, 85 L. ed. 91 and others.) Caldwell had been a secured creditor for a period of several years. No transaction in which Caldwell was involved operated to the detriment of the bankrupt estate. At the time of the trade of the Mack truck, the bankrupt was indebted to Caldwell on a secured obligation in the principal sum of $2600.00. Through sales of equipment and on payment of $100.00, this principal obligation was reduced to $1200.00. The trucks were sold by the Trustee in bankruptcy with consent of Caldwell for $750.00. Caldwell will lose in any event. His loss will be

$450.00 even if the proceeds of the sale are paid to him.

The court should note that this is a loss of capital to Caldwell and does not consider the interest due under the contract which would be substantially in excess of this figure. If Caldwell is not permitted to receive the proceeds of the sale of the equipment, the bankrupt's estate will be unjustly enriched.

There are no intervening rights of bona fide purchasers involved. The dispute is solely between the bankrupt's estate and a creditor who was secured long before the bankruptcy petition.

The facts are undisputed, the law is clear and the only legal point in question has been stipulated by counsel. Under these circumstances, the court should order the proceeds of the sale of the equipment paid to Caldwell to reduce his loss as much as possible and in justice and equity to both Caldwell and the general creditors of the bankrupt.

Respectfully submitted,
WARDE H. ERWIN,
Barzee, Leedy, Keane & Erwin

No. 14453

United States
COURT OF APPEALS
for the Ninth Circuit

CALDWELL FINANCE CO.,

Appellant,

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-54

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SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF PLEADINGS AND FACTS UPON WHICH JURISDICTION IS BASED

On October 19, 1953, Oscar Herman Herreid was adjudicated a bankrupt and subsequently a trustee was appointed.

On said date, bankrupt was in possession of one 1950 and one 1951 International Pick-up truck (Tr. 3). Said Caldwell Finance Co. (hereinafter for brevity referred to as "Caldwell") seized possession on October 27, 1953, and after said date of bankruptcy (Tr. 4).

The Referee in Bankruptcy after show cause order directed to Caldwell ordered said trucks sold free and clear of liens, and subsequently declared the alleged claim of title or lien by Caldwell to be inferior to the title of the trustee in bankruptcy (Tr. 9).

Upon petition of Caldwell for review, the Referee certified the matter to the United States District Court for the District of Oregon for review, and upon review, the order of the Referee in Bankruptcy was affirmed (Tr. 15).

From the order of the District Court, Caldwell appeals (Tr. 16).

Jurisdiction of the Referee in Bankruptcy is based upon the Congressional Act of July 1, 1898, C. 541, Sect. 2, 30 Stat. 545 as Amended, Title 11 U.S.C.A. Sections 11 and 38.

Jurisdiction of the District Court is based upon the Congressional Act of July 1, 1898, C. 541, 39, 30 Stat. 555; June 22, 1938, C 275, § 1, 52 Stat. 858. Title 11, U.S.C.A., Section 67.

Jurisdiction of this Court is based upon the Congressional Act of July 1, 1898, C. 541, Sect. 24, 30 Stat. 553 as Amended, Title 11, U.S.C.A., Section 47.

STATEMENT OF THE CASE

Appellee believes it necessary in the interest of clarity to restate the facts, and the following are the pertinent facts as found by the Referee in Bankruptcy (Tr. 5-6) and adopted by the District Court (Tr. 15).

> "On November 5, 1952, the bankrupt executed and delivered to Caldwell a chattel mortgage for $2,600 upon a certain Mack Diesel tractor owned by the bankrupt and valued at $5,500. This mortgage was duly recorded. In June, 1953, the bankrupt paid Caldwell $100 plus accrued interest on the mortgage. In July, 1953, with the consent of Caldwell, the bankrupt traded the Mack tractor to the International Harvester Company for five used trucks.
>
> "Two trucks were sold immediately and $500 was paid to Caldwell Finance Company, leaving a balance owing of $2,000. To secure this balance, there was delivered to Caldwell the following documents:
>
>> '(1) Bills of sale executed by International Harvester Company conveying to the bankrupt and Caldwell Finance Co. the two International trucks and one Ford Flatbed truck. In each bill of sale the International Harvester Company warranted the title to be free from encumbrances "except a lien in favor of Caldwell Finance Co."
>>
>> '(2) The certificates of title on the three trucks with the name of the bankrupt as transferee inserted on the back of each certificate.
>>
>> '(3) A contract of conditional sale, which on its face was drawn between the International Harvester Company and the bankrupt. The bankrupt had signed this contract, but it was not executed by the International Har-

vester Company. This company refused to execute the contract or to assign it to Caldwell Finance Company. The three trucks were described in the printed form of conditional sale contract. Also inserted was the contract price of $2000, payable at the rate of $100 per month with interest at 10% per annum.'

"On August 5, the bankrupt sold the Ford Flatbed truck for $800 and turned the money over to Caldwell, leaving a balance owing Caldwell of $1,200. The applications for the transfer of the certificates of title on the two International trucks had not been signed by the bankrupt. Caldwell produced the two certificates at the first meeting of creditors and they were signed on the back by the bankrupt at that time to enable the trustee to proceed with the sale and transfer of the trucks."

CONTENTIONS OF THE PARTIES

Appellant contends that it held title to the vehicles in question by virtue of an alleged conditional sales contract, whereas appellee contends that the alleged conditional sales contract was not a conditional sales contract, but rather was in the nature of an unrecorded chattel mortgage to secure the balance due on a note previously executed by bankrupt to said appellant and hence was invalid as against appellee-trustee.

SUMMARY OF ARGUMENT

When Caldwell released the security from its chattel mortgage given for a prior loan and attempted to secure itself for the unpaid balance of said loan, it failed to se-

cure documents which would constitute a valid conditional sales contract in favor of itself, either in form or substance, or a valid recorded chattel mortgage upon said new security as required by the laws of Oregon, and hence had only a security device in the nature of an unrecorded chattel mortgage which device was invalid as against a trustee in bankruptcy who in Oregon occupies the status of a purchaser in good faith and for value.

ARGUMENT

Section 70c of the Bankruptcy Act, provides in part:

> "The trustee, as to all property whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

In Oregon the trustee is a purchaser in good faith and for a valuable consideration by virtue of ORS 29.150 which provides as follows:

> "From the date of the attachment, until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, subject to the conditions prescribed in ORS 29.159 as to real property."

Therefore, in order for Caldwell to prevail as against appellee, it must show in itself such title to or lien upon

the vehicles as would prevail against a purchaser in good faith and for a valuable consideration.

Appellant has contended that it should prevail upon the theory that it had a valid conditional sales contract. Appellee contends that appellant has no valid conditional sales contract either in form or substance. Examining the documents in the light of appellee's contentions we find:

In Form

Among the documents upon which appellant relies is a conditional sales contract (Tr. 14). An inspection of this document shows that it is between the bankrupt and International (Tr. 14). Said contract has not been assigned to appellant and in fact, International refused to execute or assign said contract, which facts were found by the Referee and the District Court (Tr. 6).

In addition to said alleged conditional sales contract, there is a bill of sale (Tr. 10) wherein International sells and transfers said equipment to the bankrupt and Caldwell. The most that can be said of this document is that it transfers title to the vehicles to both the bankrupt and Caldwell. An inspection of the bill of sale discloses that International warranted title to be free of encumbrances "except a lien in favor of Caldwell Finance Co.", thereby evidencing that the inclusion of Caldwell upon the bill of sale was solely in recognition of Caldwell's security interest in the vehicles. Said bill of sale is of course between International on the one hand, and the bankrupt and Caldwell on the other, and not be-

tween the bankrupt on the one hand and Caldwell on the other. It does not purport to nor can it be construed to constitute a contract of conditional sale between Herreid and Caldwell.

The third set of documents involved consists of three certificates of title to the vehicles. As found by the referee, at the date of bankruptcy said certificates were endorsed by International in favor of the bankrupt as transferee and not in favor of Caldwell. There is nothing in these documents purporting to transfer title to Caldwell, and they certainly cannot be construed to be a conditional sales contract between Caldwell and the bankrupt.

It thus appears that the documents themselves show that they contain nothing in form at which Caldwell can point and say "there is a conditional sales contract."

But Caldwell argues that said documents constituted a conditional sales contract in substance.

In Substance

In determining whether the documents were even intended as a conditional sales contract, we should look behind them to the prior dealings of the parties. Upon doing so, we find that Caldwell is a finance company which held a chattel mortgage upon a truck belonging to the bankrupt. The bankrupt desired to trade said truck to International for the pickups which are the subject of this proceeding. Caldwell consented and, of course, desired to substitute the newly acquired pickups

as security for its debt in lieu of the released equipment. Caldwell was not a seller of equipment. There is no evidence that the trucks were ever in the possession of Caldwell.

As stated in the note in 138 A.L.R. 664:

> "A conditional sale contract contemplates a vendor and vendee, not a lender and borrower of money, and therefore an instrument, though in the form of a conditional sales agreement, which is executed for the purpose of securing the payment of a loan of money, will be treated as a chattel mortgage."

In the reported case, Hughbanks v. Gourley, 12 Wash. 2d 44, 120 P. 2d 523, the Court said:

> "This court has held that it is not the office of a conditional bill of sale to secure a loan of money. Its purpose, rather, is only to permit an owner of personal property to make a bona fide sale on credit, reserving title in himself, for security, until the purchase price is fully paid. Lyon v. Nourse, 104 Wash. 309, 176 P. 359. This particular security device, with its severe remedial incidents, is not favored in the law and its use has been restricted to situations where persons standing in the actual relation of vendor and vendee have desired to effect a credit sale. It is in such cases that it finds its only legitimate use.
>
> "Where, on the other hand, one who is the owner of a particular chattel wishes to borrow money and is willing to let the chattel stand as security for his debt, a chattel mortgage is the appropriate means for affording such protection to the creditor. And this is as true where the property mortgaged is purchased with the borrowed funds as where it has long been in the borrower's possession."

The Oregon court recognized this proposition in Kliks v. Courtemanche, 150 Or. 332, 43 P. 2d 913, when it stated on page 346:

> "We are unwilling to extend our conception of what may constitute a conditional sale contract to include the transaction between Phelps and the defendant culminating in the execution of the instrument of December 5, 1931. Conditional sale contracts are affected with secretiveness by nature, and their function can be much abused. They should not be employed to displace chattel mortgages which to afford protection to the mortgagee must be recorded."

In the Kliks case, the alleged conditional seller was in fact the seller. The facts of the case were: the defendant sold and delivered to the buyer on open account a mower. Some months later the seller obtained a title retaining note from buyer for $277.72 of which $105.00 represented the purchase price of the mower. The remainder of the note represented various items, including an open account and small deficiencies owing on other equipment previously sold to buyer.

The Oregon Court refused to hold that same was a valid conditional sales contract, but rather held that it was in the nature of a chattel mortgage and subject to the recording acts.

When the transaction between Caldwell and the bankrupt is examined in the light of these cases it appears obvious that the transaction fails in substance to measure up to a conditional sales contract. The transaction was one of security for a lender not of a seller—such a transaction calls for a chattel mortgage.

Answer of Appellee to Appellant Caldwell's Contentions

Appellant Caldwell has stated in its brief that whether the transaction between the parties constituted a chattel mortgage or conditional sales contract depends on the intention of the parties, and citing Kliks v. Courtemanche, 150 Or. 332, 43 P. 2d 913, states that such intention shall be ascertained from:

1. The conduct of the parties;
2. The attendant circumstances;
3. The terms of the agreement.

Appellant then looks at the conduct, circumstances, and terms of the agreement and concludes that the parties intended a conditional sales contract.

But, when we look at the conduct of the parties and attendant circumstances, what do we find that is inconsistent with an intention that Caldwell should have a chattel mortgage?

We find that Caldwell had a Chattel Mortgage for a past indebtedness and desired to release its security and take new security. In other words, Caldwell is a lender—not a seller, and the contract had its inception as a loan.

As stated by the Oregon Court in Bell v. Hanover Fire Insurance Company, 107 Or. 513, 519, 214 Pac. 340, 215 Pac. 171:

> "A well-established principle of law is that—
>
> > 'When an absolute conveyance has been made upon an application for a loan, and an

agreement is made to reconvey upon payment of the money advanced, as a general rule the transaction is adjudged to constitute a mortgage. In each case the purpose of the grantor was in the beginning to borrow money; and unless a change be shown in his intentions, it is presumed that any use he may have made of his real estate in connection with it was merely as a pledge to secure a loan.

'The parties having originally met upon the footing of borrowing and lending, although a different consideration be recited in the deed, it will be considered a mortgage until it be shown that the parties afterward bargained for the property independently of the loan.' 1 Jones on Mortgages (7 ed.), § 266

"In the case at bar, the evidence establishes the relation of debtor and creditor, and not that of vendor and vendee. The plaintiff was neither buying nor selling automobile trucks. He was investing his funds in 'automobile paper.' "

Or as stated by the Oregon Court in A. G. Spalding Bros. v. Brown, et al., 36 Or. 160, 166, 59 Pac. 185:

"The primary inquiry may be said to be the intention of the parties, and this may be determined, not alone by the instrument which forms the basis of the transaction, but by the attendant and surrounding circumstances and the conditions under which it was delivered and designed to become effective. If it was the purpose of the parties to secure a previously existing debt, or one then created, or even to arise in the future, the irresistible inference would be that the transaction culminated in a mortgage; * * *"

The burden of proof was on Caldwell to establish that it had a conditional sales contract. See Kliks v. Courtemanche, supra at page 343. There is no evidence

that Caldwell had ever acquired possession of the vehicles, nor any evidence that it had ever surrendered or acquitted the prior promissory note supporting the prior mortgage.

The unpaid purchase price of the alleged conditional sales contract had no correlation to the sale price of the equipment, or its value. The amount due on the alleged conditional sales contract is in fact the amount of the already existing debt due from the bankrupt to Caldwell.

Looking at the instruments themselves, one cannot find any semblance of a conditional sales contract. Caldwell did not originally have title to said equipment and acquired only such title as it could acquire by virtue of the bills of sale; but at the same instant and by the same bill of sale, the bankrupt also acquired his title and without reservation. Furthermore the bill of sale itself plainly limited the interest of Caldwell to a lien (Tr. 10).

Caldwell knew that International had refused to assign the conditional sales contract and, therefore, that no conditional sales contract existed between itself and the bankrupt. Yet Caldwell failed to secure himself by obtaining a properly executed and recorded chattel mortgage.

It is true that Caldwell held the certificates of title, but even these were endorsed in favor of bankrupt, and bankrupt never endorsed said certificate (Tr. 5) and there is no evidence that Caldwell ever attempted to transfer said certificates to itself.

It should be noted here also that possession of the certificates of title, or even registration of same with the

Secretary of State is not a substitute for a recorded mortgage for as found by the Oregon Court, the registration act is purely a police measure. See Larison-Frees Co. v. Payne, 163 Or. 276, 298.

Appellee is unable to find any evidence among the facts and circumstances that a conditional sale rather than a chattel mortgage was intended, but in fact, believes that since what the parties intended was security for a past debt that in fact a chattel mortgage was intended.

Furthermore, appellee believes that under the law of Oregon as set out in the Kliks case, supra, since the purpose of the documents was to secure a non-seller for a past debt, that our Court would construe any instrument between the parties as a chattel mortgage even if the instrument were properly executed and drawn in the usual form of conditional sales contracts.

Caldwell argues that equity requires that the Court hold the instant transaction to be a conditional sales contract (Ap. Br. 12-14) and even that equity should regard that as done which ought to be done (Ap. Br. 11).

But in making such argument, appellant overlooks the clear mandate of Congress in the Bankruptcy Act wherein it vested a trustee with certain clear statutory rights and powers.

Section 70 c of the Act provides in part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at

the date of bankruptcy shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The argument that equity should assist claimants in bankruptcy who failed to perfect their liens has often been made. Congress recognized this fact and in 1950, in connection with the preference sections of the Bankruptcy Act, stated its policy with regard to such arguments in Section 60a(6) of the Act as follows:

> "The recognition of equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this section. If a transfer is for security and if (A) applicable law requires a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraphs (2). Notwithstanding the first sentence of paragraphs (2), it shall not suffice to perfect a transfer which creates an equitable lien such as is described in the first sentence of paragraphs (6), that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract."

If this rule applies to preferees who have perfected their rights prior to bankruptcy, but within four months of bankruptcy, it should apply with greater force to

claimants such as Caldwell who at the date of bankruptcy have still not perfected their rights.

Therefore, if a creditor wishes to occupy as against the trustee a position as a secured creditor, it is incumbent upon such creditor to take whatever steps are required by the state law to create a valid legal lien. Caldwell has failed so to do because it failed to record a proper chattel mortgage upon said vehicles as required by ORS 86.350 and 86.370.

CONCLUSION

Thus it follows that, as the Referee in Bankruptcy and the District Court have both already held, Caldwell failed to obtain and record a valid chattel mortgage, and in fact, failed to secure any valid legal lien upon the vehicles and that, therefore, the trustee by virtue of said section 70 c of the Bankruptcy Act acquired title to said trucks free and clear of any claim of lien of said Caldwell, and, therefore, the Referee in Bankruptcy and the District Court should be affirmed.

Respectfully submitted,

EDWARD A. BOYRIE,
F. BROCK MILLER,
Attorneys for Appellee.

No. 14453

United States Court of Appeals

For the Ninth Circuit

CALDWELL FINANCE CO.,

Appellant

vs.

SAMUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt.

Appellee

Appeal from the United States District Court for the District of Oregon

APPELLANT'S REPLY BRIEF

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No. 14453

United States Court of Appeals

For the Ninth Circuit

LDWELL FINANCE CO.,

Appellant

vs.

MUEL A. McALLISTER, Trustee in Bankruptcy of the Estate of OSCAR HERMAN HERREID, Bankrupt.

Appellee

ppeal from the United States District Court for the District of Oregon

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APPELLANT'S REPLY BRIEF

Argument in Reply

Appellee relies on Section 70 C of the bankptcy act. So does appellant.

Section 70 C of the bankruptcy act only pro vides that *if a creditor of the bankrupt could hav obtained a lien by legal or equitable proceeding at the date of bankruptcy then the trustee has th rights of such a creditor.* (P. 5 Appellant's Brief.

In Oregon, no creditor of the bankrupt coul have secured a lien on the property by any pro ceedings legal or equitable because title was neve in the bankrupt, nor was it ever intended to be i the bankrupt.

Title was always in Caldwell and never in th bankrupt. How could an attaching creditor attac property to which the bankrupt did not have title

Counsel does not deny that the *intention of th parties* as to whether a transaction is a conditiona sale or a chattel mortgage is the determining facto in Oregon.

If Oregon followed the California and Wash ington rule that a conditional sale is to be construe as a mortgage and must be recorded, there migh

be a more serious question, but there can be no question but what the parties knew what they were signing in this case. They had just satisfied a chattel mortgage and deliberately chosen the conditional sale form. Under those circumstances how could it be said they intended to create a chattel mortgage? Such a circumstance or anything even remotely resembling the same was not present in any case cited by the appellee.

The rule cited by counsel on page 14 of his brief is not applicable for it applies to transfers within four months of bankruptcy.

Cases cited by counsel —

A. G. Spaulding Bros. v. Browne, 36 Ore. 160 repeats the Oregon rule that the intention of the parties is the determining factor.

Bell v. Hanover Fire Ins. Co., 107 Ore. 513—is not factually applicable as it applies to a real estate conveyance intended as a mortgage.

Larison Frees & Co. v. Payne, 163 Ore. 276, 96 P 2d 106.7. We do not quarrel with the holding but it has no relation to the question of "intention of the parties to transfer title."

Hughbanks v. Gourley, 12 Wash. 2nd 44 is not applicable because the rule in Washington as in California is that a conditional sale is treated as a chattel mortgage and must be recorded. See 92 ALR 313.

In Oregon the rule is to the contrary and depends on the intention of the parties as stated in Kliks v. Courtemanch, 150 Ore. 332 which case is relied upon by both parties.

That both instruments (chattel mortgages and conditional sales) can be construed as security devices can not be questioned and this is why the rule in Oregon is made to depend on the intention of the parties.

In *First National Bank v. McCreary,* 66 Ore. 484, 132 Pac. 718 at page 492 it was said:

"A valid mortgage is a conditional sale."

CONCLUSION

The cases cited by counsel have each been discussed and are not applicable to the facts in question, or do not state the Oregon rule.

The rule in Oregon is dependent on the intentions of the parties and the intention of the parties is clear when the same parties previously had cancelled a chattel mortgage on another piece of equipment and deliberately chose a conditional sale contract delivering bills of sale and certificates of title to the conditional vendor.

The mandate of the Oregon statutory presumption set forth on page 10 of appellant's brief is inescapable.

There would be no equity in permitting the general creditors a windfall when the money of Caldwell was secured long before the bankruptcy petition. There is no preference involved. The net

result will be a substantial loss to Caldwell in any event.

Appellee's brief discloses no cases modifying or qualifying the Oregon rule of intention. The facts are admitted and clear and the result is inescapable. Under the circumstances, the cause should be reversed with instructions to the Trustee to deliver the proceeds of the sale to the satisfaction of Caldwell's security claim and that as to the balance of said claim Caldwell be deemed to be a general creditor.

Respectfully submitted,

WARDE H. ERWIN,

Barzee, Leedy, Keane & Erwin

No. 14457

United States Court of Appeals

for the Ninth Circuit

TAKESHI TAMADA,

Appellant.

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-26-54

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United States Court of Appeals

for the Ninth Circuit

TAKESHI TAMADA,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern District of California, Central Division

No. 10,455 (D)

TAKESHI TAMADA,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

COMPLAINT UNDER SECTION 503, UNITED STATES NATIONALITY ACT

Cause of Action in Behalf of Plaintiff Takeshi Tamada

I.

Plaintiff is a citizen of the United States. He was born in Honolulu, Hawaii, on September 5, 1924. He is a permanent resident of Los Angeles, California, and within this judicial district; and he claims such residence as his permanent residence.

II.

The defendant is the Secretary of State of the Government of the United States. As such he is the head of said Department.

III.

This Court has jurisdiction herein by virtue of Title 8, United States Code, Section 903 (Section 503, United States Nationality Act). [2*]

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

IV.

In August, 1933, the plaintiff left the United States for Japan to reside there temporarily.

V.

Prior to July 9, 1948, the plaintiff applied for a passport at the office of the United States Consul in Japan, and applied to be registered as a citizen of the United States. Thereupon said United States Consul as agent of the defendant as Secretary of State, and as an officer of said State Department, denied plaintiff's claim to United States citizenship and his rights as a citizen and as a national of the United States by refusing and neglecting to issue to plaintiff a passport as requested and applied for by said plaintiff; and/or refusing to document the plaintiff as a United States citizen; and said Consul has continued to neglect and delay up to the present time, issuing a passport to the plaintiff as applied for by him, aforesaid, and/or in refusing to document the plaintiff as a United States citizen.

VI.

Said Consul thereupon, and on or about July 29, 1949, issued to the plaintiff a "Certificate of Loss of Nationality of the United States," which said Certificate was approved by the Department of State on April 22, 1949.

VII.

In December, 1944, to February, 1946, the plaintiff served in the Japanese Army. His service in

the Japanese Army was due to the Japanese Conscription law, and was the result of coercion and was not the plaintiff's free and voluntary act.

In addition, the plaintiff voted in the Japanese general elections in 1946. His so voting was the result of mistake, confusion and misunderstanding; and was not his free and voluntary act.

In 1946 Japan was not a foreign state within the meaning [3] and intent of Section 401 (e) of the United States Nationality Act, 8 U.S. Code (Section 801 (e)).

VIII.

The plaintiff Takeshi Tamada is joined as a plaintiff in this action because he and all the plaintiffs herein assert rights to relief arising out of the same series of transactions or occurrences, and questions of fact and law common to all of the plaintiffs will arise in this action.

Wherefore, the plaintiffs, and each of them, pray for relief against the defendant as follows:

That in those instances in which the plaintiffs have sought registration and/or documentation as United States citizens, that the defendant be ordered to document and/or register said plaintiffs as United States citizens; that in those instances in which the plaintiffs have applied for passports the defendant be ordered to issue passports to the plaintiffs as citizens of the United States; and that the plaintiffs, and each of them, be adjudged to be

citizens of the United States; and plaintiffs further pray for such other relief as may be proper herein.

A. L. WIRIN &
FRED OKRAND,

By /s/ A. L. WIRIN,
Attorneys for Plaintiff.

[Endorsed]: Filed October 18, 1949. [4]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant Dean Acheson, as Secretary of State, through his attorneys, Ernest A. Tolin, United States Attorney for the Southern District of California, and Clyde C. Downing and Arline Martin, Assistant United States Attorneys for the Southern District of California, and in answer to plaintiff's complaint herein admits, denies and alleges as follows:

I.

Referring to the first averment of Paragraph I of said complaint, denies that plaintiff is a citizen of the United States.

Referring to the remainder of the averments of Paragraph I of said complaint, defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and on that ground denies the remainder of the allegations in said Paragraph I.

II.

Admits the allegations contained in Paragraph II of said complaint.

III.

Admits the allegations contained in Paragraph III of said complaint. [5]

IV.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of said complaint, and on that ground denies said allegations.

V.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of said complaint, and on that ground denies said allegations.

VI.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VI of said complaint, and on that ground denies said allegations.

VII.

Referring to the allegations contained in Paragraph VII of said complaint, defendant admits that in December, 1944, to February, 1946, the plaintiff served in the Japanese army, and admits that the plaintiff voted in the Japanese general elections in 1946, and alleges plaintiff voted in 1947 & 1948. Re-

ferring to each and every other allegation contained in said Paragraph VII, defendant has no knowledge or information to base a belief, and on that ground denies said allegations.

VIII.

The allegations contained in Paragraph VIII of said complaint are rendered moot by reason of the Stipulation and Order for Severance of this plaintiff from all other plaintiffs in the action for all purposes.

And for a Further Separate and Second Defense Defendant Alleges:

I.

The complaint of plaintiff fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said complaint and denying the relief paid for therein.

Dated this 19th of December, 1949.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney;

By /s/ ARLINE MARTIN,
Assistant U. S. Attorney,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 19, 1949. [6]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF JOHN FOSTER DULLES, AS SECRETARY OF STATE, AS PARTY DEFENDANT

It Is Hereby Stipulated, pursuant to the provisions of Rule 25(d), Federal Rules of Civil Procedure, that John Foster Dulles, as Secretary of State, be substituted as party defendant in the above-entitled case.

Dated: 12 February, 1953.

So Ordered June 30, 1953.

/s/ WM. M. BYRNE,
Judge, United States
District Court.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

By /s/ ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed June 30, 1953. [8]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MARCH 19, 1954

Proceedings: For trial.

On motion of Attorney Grean, It Is Ordered that the Answer at page 2, paragraph 7, line 14, be amended by interlineation to read "and alleges plaintiff voted in 1947, 1948."

K. Iwanaga is sworn as interpreter of the Japanese language.

Taheshi Tamada, plaintiff, is called, sworn, and testifies in his own behalf. At 10:30 a.m., court recesses.

At 11:05 a.m., court reconvenes herein, and all being present as before, Plaintiff resumes testimony in his own behalf.

Plf's. Ex. 1, marked for ident., is admitted in evidence.

On motion of plaintiff, It Is Ordered that all exhibits in Case No. 1232-ND Civil, Matsuye vs. Dulles, be admitted in evidence, by reference.

Exhibits 2 and 3 are admitted in evidence.

At noon court recesses. At 2:05 p.m., court reconvenes herein, and all being present as before, plaintiff resumes testimony in his own behalf.

Deft's. Ex. A, B, and C are marked for ident., and Ex. C is admitted in evidence. Deft's Ex. D and E are marked for ident.

At 3:05 p.m., court recesses.

At 3:15 p.m., court reconvenes herein, and all being present as before, Plaintiff resumes testimony in his own behalf.

Deft's Ex. A and D are admitted in evidence.

Both sides rest.

Counsel argue.

Court makes a statement and Orders Judgment for defendant; Attorney Grean to prepare judgment and findings accordingly.

Filed list of exhibits.

EDMUND L. SMITH,
Clerk;

By /s/ EDW. F. DREW,
Deputy Clerk. [9]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on regularly for trial on March 19, 1954, before the Honorable William M. Byrne, Judge Presiding, without a jury, the plaintiff appearing by his attorneys, Wirin, Rissman & Okrand by Hugh R. Manes, and the defendand appearing by his attorneys, Laughlin E. Waters, United States Attorney, and Robert K. Grean, Assistant United States Attorney, by Robert K. Grean, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The plaintiff, Takeshi Tamada, is the son of Japanese born parents. He was born in Honolulu, Hawaii, September 5, 1924, and claims Los Angeles, California, within this judicial district as his permanent residence. [10]

II.

The defendant, John Foster Dulles, is the Secretary of State of the Government of the United States, and as such, is the head of the State Department.

III.

In the latter part of 1948 or in early 1949, plaintiff first went to the American Consul to apply for a passport to return to the United States as a United States citizen. His application was denied, and instead, the Consulate issued, and the Department of State, on November 1, 1948, approved, a Certificate of the Loss of Nationality of the United States by the plaintiff that he had expatriated himself under the provisions of Section 401(c) of the Nationality Act of 1940 by serving in the Japanese Army from December 1, 1944, to February 17, 1946.

IV.

Plaintiff acquired Japanese nationality at birth, and his name was entered in his father's Family Register on December 2, 1924.

V.

Plaintiff journeyed to Japan in August, 1933, ac-

companied by both parents, one older brother, two younger sisters and one younger brother. His older brother, mother and father died in Japan.

VI.

In October, 1941, plaintiff became employed at the Naval Arsenal at Hiroshima, Japan, making airplane parts, where he was so employed until December of 1944. His purpose in working at the Naval Arsenal was to aid his family's financial condition.

VII.

In December of 1944, plaintiff entered and served in the Japanese Army, where he served to February, 1946. He entered the Army as a second class private and after basic training at Hiroshima, was transferred to China where he took and passed an examination to enter the Kempetai, the Japanese Military Police. [11]

VIII.

His training in the Kempetai taught him how to capture a prisoner, how to follow suspects, how to search suspects, how to investigate crime and how to use firearms.

IX.

Plaintiff was stationed at Nanking where he supervised actions of other soldiers transacting business with Chinese, checked on soldiers who were absent without leave and watched for the smuggling of arms.

X.

Plaintiff did not protest his induction into the

Army and did not protest his service in the Kempetai since he was told that if he refused to go to Military Police School, he would be transferred to another branch of the Army.

XI.

When describing his military service to the Vice-Consulate in furtherance of his application for passport, plaintiff concealed his service in the Kempetai and denied being a member of the Kempetai when officially questioned with regard thereto.

XII.

Plaintiff voted in Japanese elections in Japan in 1946, 1947 and 1948.

XIII.

In three separate statements to the American Consul, both written and oral, plaintiff stated under oath that he voted in April of 1946 only and did not vote in 1947 and 1948.

XIV.

Plaintiff voted April 5, 20, 25 and 30, in 1947: and on October 5 and November 15, in 1948.

XV.

Plaintiff's service in the Japanese Army while possessing Japanese nationality was his free and voluntary act.

XVI.

Prior to voting, plaintiff did not make a claim to citizenship of [12] the United States, nor did he request exemption from voting.

XVII.

Plaintiff's voting in 1946, 1947 and 1948 in the Japanese General Elections was in each instance his free and voluntary act.

XVIII.

The elections held in Japan in April of 1946, in April of 1947, and in October and November of 1948, were political elections within the meaning of Section 401(e) of the Nationality Act of 1940 (8 U.S.C. 801(e)).

XIX.

That Japan in 1947 and 1948 was a foreign state within the meaning of Section 401(e) of the Nationality Act of 1940 (8 U.S.C. 801(e)).

Conclusions of Law

I.

This Court has jurisdiction under the provisions of the Nationality Act of 1940, Section 503 (8 U.S.C. 903), to hear and to make a judicial determination as to whether or not the plaintiff lost his nationality by expatriating acts of entering and serving in the Army of Japan while possessing Japanese nationality, and by voting in the Japanese elections of April, 1946 and 1947 and October and November of 1948.

II.

Prior to the outbreak of war with Japan on December 7, 1941, Japan was and continuously until the present time has been a foreign state within the

meaning and intent of Section 401(e) of the United States Nationality Act of 1940 (8 U.S.C. 801(e)).

III.

The elections held in Japan in April, 1946 and 1947 and October and November of 1948, were political elections within the meaning and intent of Section 401(e) of the United States Nationality Act of 1940 (8 U.S.C. 801(e)).

IV.

That Section 402 of the Nationality Act of 1940 (8 U.S.C. 802), raises a presumption of expatriation under Subsection (c) of Section 401 of the [13] Nationality Act (8 U.S.C. 801(c)), when a national of the United States remains for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state and the plaintiff has not overcome said presumption.

V.

Plaintiff's voting in the Japanese elections of April, 1946 and 1947 and October and November of 1948, was his free and voluntary act within the meaning and intent of Section 401(e) of the Nationality Act of 1940 (8 U.S.C 801(e)).

VI.

The plaintiff, a citizen of the United States by reason of birth in the United States, lost his nationality by voluntary service in the Armed Forces of Japan while possessing Japanese nationality and by voting in political elections in Japan, and from the time of

committing said expatriating acts has not been and is not now a citizen of the United States.

Let judgment in favor of the defendant and against the plaintiff herein be entered accordingly.

Dated: This 19th day of April, 1954.

/s/ W. M. BYRNE,
Judge, U. S. District Court.

[Endorsed]: Filed April 19, 1954. [14]

In the United States District Court in and for the Southern District of California, Central Division

No. 10455-WB

TAKESHI TAMADA,

Plaintiff,

vs.

JOHN FOSTER DULLES,

Defendant.

JUDGMENT

The above cause having come on regularly for trial on March 19, 1954, before the Honorable William M. Byrne, Judge Presiding, without a jury, the plaintiff appearing by his attorneys, Wirin, Rissman & Okrand by Hugh R. Manes, and the defendant appearing by his attorneys, Laughlin E. Waters, United States Attorney, and Robert K. Grean, Assistant

United States Attorney, by Robert K. Grean, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, and having heretofore made and filed its Findings of Fact and Conclusions of Law, and having ordered that a Judgment be entered in accordance therewith,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as Follows:

I.

That the plaintiff, Takeshi Tamada, having acquired United States nationality by birth at Waimalu, Honolulu, on September 5, 1924, lost United States [15] nationality by voluntarily serving in the Japanese Army while possessing Japanese nationality, and by voluntarily voting in political elections in Japan, and is not now, nor has he been, a citizen and national of the United States of America since said service and voting.

II.

It Is Further Ordered that plaintiff's prayer for a Judgment and for a Decree adjudging that he is a citizen and/or national of the United States is hereby denied.

III.

It Is Further Ordered that the plaintiff is not entitled to the rights and/or privileges of a national or citizen of the United States, and is not entitled to a passport in order to return to the United States,

and that the defendant shall have judgment and his costs. Costs taxed at $20.00.

Dated: This 19th day of April, 1954.

/s/ W. M. BYRNE,
Judge, United States
District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 19, 1954.

Docketed and entered April 19, 1954. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Takeshi Tamada, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on April 19, 1954.

Dated: This 18th day of June, 1954.

A. L. WIRIN &
FRED OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1954. [18]

In the United States District Court, Southern District of California, Central Division

No. 10455-WB (D)-Civil

TAKESHI TAMADA,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

WIRIN, RISSMAN & OKRAND, By HUGH R. MANES, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney; By

ROBERT K. GREAN,
Assistant United States Attorney.

Friday, March 19, 1954, 9:45 A.M.

The Court: The clerk will call the calendar.

The Clerk: No. 10455-WB Civil, Takeshi Tamada, v. John Foster Dulles, for trial.

Mr. Manes: Ready for the plaintiff, your Honor.

Mr. Grean: The defendant is ready, your Honor.

The Court: You may proceed.

Mr. Grean: I should like at this time to request permission to interlineate an amendment to the answer and specifically referring to it on page 2, at line 14, where it says, "and admits that the plaintiff voted in the Japanese general elections in 1946," I should like to add the words "and alleges that the plaintiff voted in 1947."

Mr. Manes: No objection, your Honor.

The Court: It will be so amended.

Mr. Grean: Thank you.

Mr. Manes: If your Honor wishes, I shall proceed.

The Court: You may proceed.

Mr. Manes: Mr. Iwanaga.

It will be necessary to use an interpreter, your Honor.

(K. Iwanaga was sworn as interpreter of the Japanese language.)

(Takeshi Tamada, the plaintiff, was duly sworn as a witness in his own behalf.) [3*]

The Clerk: Your full name?

The Plaintiff (Through interpreter): Takeshi Tamada.

Mr. Grean: Your Honor may I have a short voir dire on the interpreter?

The Court: Yes.

Mr. Grean: Will you be sworn, please, Mr. Interpreter?

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

K. IWANAGA

called as a witness on voir dire, being first duly sworn, testified as follows:

The Clerk: Your full name, please?

The Witness: K. Iwanaga.

Voir Dire Examination

By Mr. Grean:

Q. Mr. Iwanaga, are you related to the plaintiff or any member of his family? A. No, sir.

Q. Have you had a long acquaintanceship with the plaintiff?

A. No, sir. I have met him last Friday for the first time at the attorney's office.

Q. You did not know him before that?

A. I did not.

Q. Or any members of his family?

A. I do not.

Mr. Grean: No further questions. [4]

TAKESHI TAMADA

the plaintiff, called as a witness in his own behalf, having been duly sworn, testified through the interpreter as follows:

Direct Examination

By Mr. Manes:

Q. Mr. Tamada, where were you born?

A. Honolulu, Hawaii.

Q. When were you born?

A. In 1924, September 5th.

Q. And where do you live now?

(Testimony of Takeshi Tamada.)

A. 1935 Purdue Avenue.

Q. And, if permitted, do you intend to make California your permanent residence?

A. Yes, sir.

Q. And is that in Los Angeles that you live now?

A. Yes, sir.

Q. Did you ever go to Japan? A. I did.

Q. When did you go to Japan?

A. 1933, August.

Q. How old were you at the time?

A. Eight, eight years old.

Q. Did anybody accompany you to Japan?

A. My both parents, one older brother, two younger sisters and one younger brother. [5]

Q. While you were living in Hawaii, did you ever go to school? A. I did.

Q. How long did you go to school?

A. From 1931 to 1933.

Q. And was that a grammar school in Hawaii?

A. Yes, sir.

Q. For what purpose did you go to Japan?

A. My parents wanted to teach me Japanese language.

Q. Do you recall, or do you know, how long you were supposed to stay in Japan?

A. The intention was to finish the grade school and then take up agriculture course and then come back to the United States to complete agriculture course.

Q. Agricultural course?

Mr. Grean: And the rest of that answer, please?

(Testimony of Takeshi Tamada.)

A. And then return.

Q. (By Mr. Manes): And did you go to school while in Japan? A. Yes, I did.

Q. What school did you go to?

A. I finished my grade school and then went to Yoshida Agricultural School.

Q. Did you graduate from Yoshida Agricultural School? A. Yes, I did. [6]

Q. When did you graduate from that school?

A. March of 1941.

Q. And while you were in that school were you known as an American citizen by the students there, to the best of your knowledge?

Mr. Grean: Your Honor, I object to that question as calling for a conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Manes): Had you ever advised anybody at school that you were an American citizen? A. I did, sir.

Q. Whom did you so advise?

A. While attending at the Yoshida Agricultural School I have spoken to Nisei that attended the school, that I was an American citizen.

Q. And with whom did you associate mostly while you were in agricultural school?

A. I was intimate with those who have come back from the United States, Nisei, they are.

Q. During your conversations with these people, with these Nisei people, what were the main topics of conversation, if you can remember?

(Testimony of Takeshi Tamada.)

Mr. Grean: Will you fix this time as to year, please, counsel?

Mr. Manes: Yes, I will. [7]

Q. During what period of time were you associating with these Nisei people while in agricultural school? A. From around 1939 to 1941.

Q. And what were the things that you discussed with the Nisei during this period of time?

Mr. Grean: I am going to object to the question as being immaterial and irrelevant, as to what he discussed with the Nisei.

The Court: Objection overruled.

Mr. Grean: If counsel desires to relate it to any particular matter.

I can't see the materiality of just whatever he might have discussed.

The Court: I imagine that it is a preliminary question.

Mr. Manes: I am sorry, your Honor. I didn't hear your statement.

The Court: I imagine it is a preliminary question. The question will be permitted.

Mr. Manes: Yes, your Honor.

A. Discussing about the recent things happening in the war from those who came back.

At that time there was an incident happening with China, and we were afraid that we may be taken in, in the army.

Mr. Grean: If the court please, if this question is permitted to stand and if this plaintiff is permitted to say [8] everything he discussed, he can

(Testimony of Takeshi Tamada.)

relate every self-serving statement that he desires pertaining to this case, or any other thing. I am going to ask that his last answer be stricken as not being responsive to the question which counsel is seeking to develop here.

The Court: Denied.

A. (Continued): We have discussed mostly our problems as citizens.

Q. (By Mr. Manes): As citizens of where?

A. An American citizen.

Q. And one of the problems you discussed then was the question of what to do about the army as American citizens, is that correct?

Mr. Grean: I object to the question as leading.

The Court: Sustained.

Q. (By Mr. Manes): After your graduation, Mr. Tamada, in March of 1941, what did you do then, if anything?

A. While I attended that school, it was only as a second-grade school, and when I finished it was elevated to a higher grade.

And I attended two years the upper grade and I was sick and I left school around May, because I was afraid that I may be worse physically and then financially I was in difficulty.

Mr. Manes: Mr. Interpreter, did you mean two years or two months? [9]

The Interpreter: Two months.

Q. (By Mr. Manes): During this period of time about March, 1941, where were you living in Japan?

(Testimony of Takeshi Tamada.)

A. While attending school up to March, I was in the dormitory of the school.

Q. And after you left the school, where did you live then? A. And then I stayed at home.

Q. And where was that? A. Asa-gun.

Q. Was that in the city itself?

A. Oh, about six miles away from the city.

Q. And with whom were you living at that time?

A. Myself, my father and my stepmother, a younger brother and two younger sisters. I think that is all the members.

Q. Did you ever serve in the Japanese Army?

A. I have.

Q. When?

A. Showa 19, the first of December.

The Interpreter: Corresponding to our calendar 1944.

Q. (By Mr. Manes): And why did you serve in the Japanese Army at that time?

A. At that time, even though we may refuse, we were not able to do so. [10]

Mr. Grean: I object and ask that that answer be stricken as not being responsive.

The Court: Well, it may go out.

Mr. Manes: I don't believe he has finished yet.

The Court: Repeat the question to him.

(Question repeated.)

A. If I refuse to get in the army, the gendarme will get me, and I feared that I may be punished, and I also feared about the welfare of my family,

(Testimony of Takeshi Tamada.)

and then my family be treated as a traitor perhaps if I take that action. Those are the main reasons.

I was afraid of losing my citizenship, because I knew I had American citizenship, if I go in the army.

Q. (By Mr. Manes): What kind of punishment did you fear?

A. That is, if I refuse to submit to the order.

Q. Yes.

A. Because I do not know exactly what will happen to me, but—well, I have been informed that gendarme will get me if I refuse to obey.

Q. Did you respond to some kind of a notice or order to report to the army? A. Yes, sir.

Q. You received such an order?

A. It was a notice for me to report on a certain hour, a certain day, at a certain place. [11]

Q. So that you reported for the reason that you mentioned, is that correct? A. Yes, sir.

Q. And where were you stationed or located?

A. Originally it was in Hiroshima.

Q. And what did you do there?

A. From 1st of December to the 9th I had a training of—I had a little of basic training.

Q. And what happened then, if anything, or what did you do then, if anything?

A. It was on the evening of the 9th we left Hiroshima and went to Moji. And then we were embarked on a ship and sent to Pusan. And then we crossed the Korea—we crossed Korea and went to a place called Koshu.

(Testimony of Takeshi Tamada.)

Q. And were you stationed and finally located at Koshu?

A. No, sir. We remained at Koshu until about March 20th.

Q. Of what year? A. Showa 20.

The Interpreter: 1945.

Q. (By Mr. Manes): And where is Koshu?

Mr. Grean: 1945?

The Interpreter: Yes.

Q. (By Mr. Manes): And where is Koshu?

A. Koshu is in China. [12]

Q. And what were your duties while you were stationed in Koshu?

A. Well, it is a beginner's basic training in the army.

Q. And how long did you have this basic training in Koshu?

A. It was from around January to March.

Q. Of what year? A. Showa 20.

The Interpreter: 1945.

Q. (By Mr. Manes): After you were through with basic training at Koshu, what were your duties then?

A. And then they put me into the recruits as a Kempei gendarme.

Q. Was that known as a Kempei Tai?

A. Well, it is a place for schooling for Kempei.

Q. What kind of an organization was this Kempei?

A. It is more or less a policing of the army.

Q. Did you volunteer for this assignment?

(Testimony of Takeshi Tamada.)

A. No, I did not. I was simply drafted into it.

Q. Did you protest your assignment to anybody?

A. I was told if I refused to get into the Kempei school I would be sent to another branch of the army.

Q. Who told you this?

A. One of my superiors.

Q. Did you protest to anybody else? [13]

A. At that time?

Q. At that time.

A. Well, I was told before I objected, protested, that if I refused to go into the other branch of the army, why, I will have to stay in the Kempei.

Q. Did you ever protest to any officer in your unit about serving in the Kempei Tai?

A. I did.

Q. To whom?

A. He told me that if I wouldn't remain in the Kempei, I would be sent to another branch of the army.

And then I went to the Kempei office and then there was a receptionist there and he ordered me to take the examination for the Kempei school.

And I told him I did not want to do that.

Then he asked me the reason why.

And I wasn't able to answer him at that time.

Well, he told me that, "It seems like you do not like to serve in the army. I suppose you want to get home, but the real work is going to start from now. Well," he said, "you got the wrong idea, if you want to get discharged and go home."

(Testimony of Takeshi Tamada.)

Then I told him, "Well, if that is the case, I can't help it, I go into the Kempei school."

Q. Were you acquainted with the methods of the Kempei? A. Well, I know a little. [14]

Q. And what did you know?

A. One of the work I did was to supervise—and then watching the acts of the other soldiers transacting business with the chinese, and then checking up those soldiers absent without leave, and watching for smuggling of arms.

Mr. Grean: Watching for smuggling of what?

The Interpreter: Smuggling of arms.

Q. (By Mr. Manes): And where were you stationed while a member of the Kempei?

A. At Nanking.

The Court: We will take our recess a little early this morning.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Manes): Mr. Tamada, while you were in the Kempei, did you ever witness any acts of brutality practiced by members of the Kempei on anyone?

A. No, sir, I have not seen acting on others, but I was myself beaten several times.

Q. What were the occasions of these beatings?

A. Once I failed to salute my superior.

Once I took a bath before my superior took the bath.

And once I was struck because I giggled and showed my teeth.

(Testimony of Takeshi Tamada.)

Q. Were there any other occasions when you were struck, [15] when you first came into the Kempei? A. Yes, at the beginning.

Q. By whom?

A. That is a man that was at the receptionist desk.

Q. And why did he strike you?

A. When he told me to take the examination for the Kempei and I told him I didn't care to take it.

Then I told him that if I have to get in the Kempei, I would rather be just a plain member, and that is when he struck me.

And he said, he told me, "You are a fool to be just a plain member. Well, if you be a plain member, then you will be serving your superior all your life."

And then he finally forced me into it and I had to take the job.

Q. And why did you want to be just a plain member of the Kempei?

A. If I take the noncommissioned officer's course, I know that my period of service will be longer. I wat not ambitious to be promoted. I was anxious to leave the army as soon as possible.

Q. Now, Mr. Tamada, how long did you serve in the army? A. Kempeitai?

Q. No. In the army. How long did you remain in the army? [16]

A. From Showa 19——

The Interpreter: That is 1944.

A. ——to in Showa 20——

The Interpreter: That is 1945.

(Testimony of Takeshi Tamada.)

A. ——that is when the war ended, in Showa 21——

The Interpreter: That would be 1946.

A. ——that is when I was sent back to Japan.

Mr. Grean: Showa 21 is what year?

The Interpreter: I beg your pardon?

Mr. Grean: What was that last date you gave us?

The Interpreter: Showa 21, corresponding to 1946.

Q. (By Mr. Manes): Did you ever vote in a political election?

Just a moment, Mr. Interpreter. Let me get at it in this fashion:

Did you ever vote in any political election in Japan? A. I did.

Q. When? A. 1946, '47, and '48.

Q. And why did you vote in those years?

A. At that time Japan was occupied by the United States Army, and General MacArthur was the head man. And the orders came from MacArthur's office that all should go to vote.

And then I was informed if I do not vote I may probably [17] lose my American citizenship and also suffer other penalty. And a man by the name of Okamoto, who happened to be the second head man of the village, he came to me and said that I must go to vote, and he told me that if I did not vote, I would lose my ration privilege.

Q. Who was Mr. Okamoto?

A. He is the second head man of the village.

(Testimony of Takeshi Tamada.)

Q. You state that you were informed that you would lose your citizenship if you did not vote?

A. Yes, I did.

Q. Why would you lose your American citizenship if you did not vote?

A. I was afraid because it was an order came from MacArthur's office and if I did not abide by it, I would be losing my citizenship.

Q. Did you know that there were elections held in Japan in 1949 and 1950? A. I do.

Q. Did you vote in those elections, in those years?

A. I did not.

Q. Why not?

A. After I last voted I have heard on the radio and read in the papers that those who voted would most likely lose their American citizenship, and that is why I did not vote. [18]

Q. Previous to that communication over the radio and newspaper, did you know that you would lose your American citizenship if you voted?

A. No, I did not know.

Q. In 1948 was the first time that you learned that you would probably lose your citizenship if you did vote, is that correct?

A. Yes, sir; that is after I voted.

Q. Now, when was the first time that you went to the American Consul while you were in Japan?

A. In the early part of 1949.

Q. And for what purpose did you go to the American Consul?

(Testimony of Takeshi Tamada.)

A. I went to apply for a passport to return to the United States.

Q. And were you able to receive a passport?

A. No. I was refused.

Q. And why were you refused, if you know?

A. Because I was in the army, and then I voted.

Mr. Manes: I ask that this document be marked for identification, purporting to be a "Certificate of Loss of Nationality of the United States, approved by Department of State April 22, 1949," and signed by Stanley S. Carpenter, American Vice Consul.

The Clerk: Exhibit No. 1 marked for identification. [19]

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Manes): Mr. Tamada, I show you Exhibit No. 1 for identification, purporting to be a "Certificate of Loss of Nationality of the United States," and I will ask you whether or not you received such a document on or about the year 1949.

A. I remember.

Mr. Manes: I offer this as an exhibit.

The Court: It will be received.

The Clerk: Exhibit No. 1 in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Mr. Manes: I would at this time like to ask counsel whether he will stipulate with respect to the exhibits furnished in the Matsuye case last

(Testimony of Takeshi Tamada.)

Tuesday, that it be stipulated that they be either marked for identification or offered into evidence as the case may be, and that the same rulings be made here as were made there.

Mr. Grean: And that includes those exhibits which were incorporated by reference from the Takeshita case?

Mr. Manes: That is correct.

Mr. Grean: It is so stipulated. [20]

Mr. Manes: I will also offer into evidence as exhibits two documents which are the depositions of Dr. Shinkichi Unno and the deposition of Mr. Keiichi Yoshioka. These depositions were taken in this case and filed with the court on October 17, 1950. I offer them into evidence as Exhibits 2 and 3.

Mr. Grean: No objection.

The Court: They were taken in this case?

Mr. Manes: Yes, your Honor, by order of Judge Mathes.

The Clerk: They were taken by Miss Martin in Japan.

The Court: They may go in.

The Clerk: Exhibits 2 and 3 in evidence.

(The documents referred to, marked Plaintiff's Exhibits Nos. 2 and 3, respectively, were received in evidence.)

Mr. Manes: I have no further questions at this time.

(Testimony of Takeshi Tamada.)

The Clerk: Exhibit No. 2 is the deposition of Keiichi Yoshioka.

Exhibit No. 3 is the deposition of Skinkichi Unno.

Mr. Grean: May I at this time, if the court please, offer a further amendment to the interlineation which was made in amending the answer this morning, to add the words "and 1948" in paragraph VII of the answer?

The Court: Yes.

Mr. Grean: Which, with that inclusion, will read, "and alleges that the plaintiff voted in 1947 and 1948." [21]

The Court: Granted.

Mr. Grean: Thank you.

Cross-Examination

By Mr. Grean:

Q. Mr. Tamada, with whom are you residing here in Los Angeles?

A. I am living with my brother-in-law.

Q. That is your sister's husband?

A. Yes, sir.

Q. And where is your other sister at present?

A. She lives in Chicago.

Q. And where is your older brother?

A. My older brother dided in Japan in the year Showa 12.

The Interpreter: That is 1937.

Q. (By Mr. Grean): And your younger brother?

(Testimony of Takeshi Tamada.)

A. He is in the United States Army, stationed at Hokkaido.

Q. He is there at the present time?

A. Yes, sir.

Q. And what about your mother and father? Where are they now? A. They both died.

Q. Did they die in Japan? A. Yes, sir.

Q. Did they ever return to the United States after they [22] went with you in 1933 to Japan?

A. No, sir.

Q. Did you or your parents own any land in Japan? A. Yes, sir.

Q. And was that farm land? A. Yes, sir.

Q. And did your going to agricultural school result from a desire to learn how to farm the land which you had in Japan? A. No. It is not so.

Mr. Grean: He has answered the question.

Mr. Manes: I request that we have the rest of the answer, if there was any more.

The Court: Is there more to the answer?

The Interpreter: He was trying to say something, your Honor.

The Court: What is that?

The Interpreter: He was trying to say something. I didn't get the whole answer.

The Court: Ask him if he finished his answer.

A. Yes, a little I wish to say.

Q. (By Mr. Manes): What?

A. I wish to state a little more.

The property which became in my name was after the war when they had the farm reformation in

(Testimony of Takeshi Tamada.)

Japan. And of course [23] I did not purchase any property to engage in farming, but this property came to me after the war.

Q. (By Mr. Grean): Now, Mr. Tamada, you traced your activities this morning for your counsel, from approximately 1953 up to the time that you went into the army, but weren't you during that period a machine technician at the navy arsenal at Hiro?

The Interpreter: What was that date?

The Reporter: "1953."

The Interpreter: The plaintiff wants to know what date was it, Mr. Grean.

Mr. Grean: 1933, up to the time he went into the army.

A. Yes. I worked there for a while.

Q. (By Mr. Grean): And that arsenal was engaged under the Japanese Navy in the manufacture of airplane parts, is that right?

A. Yes, it was attached to the navy, but I wouldn't say it was a munition factory.

Q. I didn't say it was a munition factory either, Mr. Tamada. I said that it was manufacturing airplane parts during that time, is that correct?

A. Yes, sir.

Q. When did you first go to work at the navy arsenal in Hiro?

A. I started to work, I believe it was, October 1st, [24] Showa 16.

The Interpreter: That is 1941.

(Testimony of Takeshi Tamada.)

Q. (By Mr. Grean): And how long did you continue to work there?

A. Around up to Showa 19, at the end of—up to the end of November, Showa 19.

The Interpreter: That is 1944.

Q. (By Mr. Grean): So that from 1941 to a month before you went into the army in 1944, you were engaged in working at the navy arsenal at Hiro? A. Yes, sir.

Q. Now, this morning you testified that in 1941, after you graduated from the agricultural school, you attended an upper grade for about two months and then you were sick and left school around May of 1941. Do you recall that testimony?

A. Yes, sir, about two months.

I finished school around Showa 15.

The Interpreter: That is 1940.

A. (Continuing): And then I was sick around September in the same year, and I was sick, so I just attended from about January to March.

And then I graduated and then I hesitated to go back because I was weak, and then I had financial difficulties at the time at my home.

Q. (By Mr. Grean): Then you testified that you stayed at [25] home at Asa-gun, which was about six miles away from the city of Hiroshima, and you were living there with your family.

A. Yes, sir.

Q. Well, did you continue to live there while you were working at the navy arsenal?

(Testimony of Takeshi Tamada.)

A. No, I did not stay at home. I lived near the place where I worked.

Q. Then you testified this morning that after you left school and before you went into the army you lived with your family. Was that for a short period of time? Is that what you meant to say?

A. Yes, a short time.

Q. Now, when you testified this morning that you were afraid that the gendarme would get you, were you referring to the Kempeitai?

A. Is it in regard to my notice to enter the army?

Q. Yes.

A. Yes, if I refused to abide by the notice I was afraid the Kempeitai may come over and get me.

Q. The Kempeitai was the military police at that time of the government, was it not?

A. Yes, sir.

Q. And they were pretty much in charge of the affairs in Japan at that time, weren't they? [26]

A. Yes, sir.

Q. Were they ever referred to as the "secret police," Mr. Tamada?

A. I didn't know it to that extent.

Q. At the time that you received this notice, was it a notice to report for a physical examination?

A. I received, around the middle of Showa 19——

The Interpreter: That is 1944.

A. ——a notice to take my physical examination.

(Testimony of Takeshi Tamada.)

Q. And where were you at the time you received that notice?

A. I am not positive where I received that notice.

Q. Where did you report for your physical examination? A. I went to Kure.

Q. And you weren't sick at that time, were you, Mr. Tamada?

A. No. I was not. I had recovered.

Q. You were in good physical condition?

A. Yes. Yes, I passed with perfect grade.

Q. And had you had any training in judo in your school?

Mr. Manes: Objected to as immaterial.

The Court: Objection overruled.

A. I learned a little of this Kendo, that is this fencing.

Q. (By Mr. Grean): How did you rank in your class as a [27] fencer?

A. No, I was not classified.

Q. And did you have any military training while you were in school? A. Yes.

Q. What did that military training consist of, Mr. Tamada?

A. Oh, it was a low class of middle school and the training was very rudimentary, marching around.

Q. What else did you learn in military training while you were in school?

A. Carrying around a wooden gun, and then we were ordered to march, and the "Attention" and all those simple orders.

(Testimony of Takeshi Tamada.)

Q. Did you have any training in hand grenades?

A. No, sir, I have not.

Q. While you were in agricultural school, was there any military training?

A. Oh, that military training I referred to was in the—was at the agricultural school.

Q. I see. Now, at the time you got your notice to report for physical, did you protest about taking your physical examination, to anyone?

A. In other words, is the protesting refusing to enter the army? [28]

Q. Yes. Did you tell anyone that you were an American citizen, that you didn't want to take your physical, or did you go to see any official about it?

A. I was afraid to say such things.

Q. Then your answer is "No," that you did not protest or talk to anyone about it, is that correct?

A. That is right.

Q. Now, how soon after you received your notice of physical fitness were you told to report to the army?

A. We had several examinations, physical examinations, on the day, and then, when we passed the last examination that day, they will classify us whether we passed or not. It was on that date.

Q. And on that date, which you testified was sometime in the middle of 1944, I believe, were you told when you should appear for army induction?

A. I was told to report in December.

Q. Between the time that you took your physical examination and the time you were told to report,

(Testimony of Takeshi Tamada.)

that is, between the time that you took your physical examination and the time you reported, did you continue to work at the navy arsenal?

A. Yes, sir.

Well, I have been previously given notice that my work was frozen, I wasn't to leave it.

Q. Now, when was it that you took the examination to [29] enter into the Kempeitai? Strike that.

Was it necessary for you to take an examination to become a member of the Kempeitai?

A. Yes, sir.

Q. And what did that examination consist of, if you remember, Mr. Tamada.

A. Of course, in my case I was for a plain member of the Kempeitai, and the subjects consisted of arithmetic, language, I believe there was composition, and a little of history, and the others I cannot remember.

Q. And how many took the examination with you at that time?

A. Well, there were quite a number, but I don't know the number of them.

Q. Well, were there 10, were there 25, or were there 50?

A. Well, there must have been between 200 and 300.

Q. And how many out of that 200 or 300 passed that examination, do you know?

Mr. Manes: Objection. It calls for a conclusion.

The Court: It calls for a conclusion, all right.

(Testimony of Takeshi Tamada.)

It is a conclusion of fact. If he knows he can testify to it.

Mr. Grean: Did he answer that question?

A. I believe very few failed.

Q. (By Mr. Grean): Now, isn't it true that you volunteered, that it was necessary to volunteer for membership in [30] the Kempeitai?

A. Oh, I have been forced to take that examination.

Q. Isn't it true that it was necessary to volunteer to become a member of the Kempeitai?

A. Yes, usually they volunteer, but in my case I was told to go—I was forced to take that examination; otherwise I would be transferred to some other branch of the army.

Q. And it was because you didn't want to be transferred to some other branch of the army that you took the examination for Kempeitai, is that correct?

A. If I didn't take the examination for a plain member of the Kempeitai, I was told that I may have to take the noncommissioned officer's training.

Q. In other words, they thought pretty well of you—Strike that.

Isn't it true that the Kempeitai membership was considered an honor?

A. It seems like people thought so, because many of the people were afraid of the Kempeitai.

Q. Did the Kempeitai receive higher pay than the ordinary soldier?

(Testimony of Takeshi Tamada.)

A. I don't know the difference.

Q. And the Kempeitai had authority over the ordinary soldier, didn't they?

A. Well, I believe so. [31]

Q. And the Kempeitai carried firearms on their persons? A. Is it pistol?

Q. Yes. A. Yes, sir.

Q. What other insignia or what other uniform distinguished them from the ordinary soldier?

Mr. Manes: I object to that as to form, and he assumes a fact in evidence that is not there.

The Court: Objection overruled.

A. My uniform wasn't any different from the other soldiers, only we wore a band on our arm designating that we are Kempeitai. Then we wore leggings.

Q. (By Mr. Grean): And the other soldiers that were not in the Kempeitai did not wear leggings, is that correct?

A. Yes; it might be a cavalary may wear it, but others don't.

Q. Well, now, what rank were you when you first entered the army?

A. I was a second-class private.

Q. And when did your first promotion come?

Mr. Manes: Objection as to form and it assumes facts not in evidence.

The Court: Sustained.

Q. (By Mr. Grean): Were you promoted, Mr. Tamada, from second-class private? [32]

A. Yes. I remember I became a first-class.

(Testimony of Takeshi Tamada.)

Q. And when was that?

A. Maybe around May or June, but I am not certain.

Q. Of what year? A. Showa 20.

The Interpreter: Corresponding to 1945.

Q. (By Mr. Grean): And were you promoted after that? A. I was not promoted.

Q. And what sort of membership did you have in the Kempeitai, were you an ordinary, a plain member, as you stated, all during the time that you were in the army?

A. I went into the Kempeitai around May of Showa 20——

The Interpreter: That is our calendar 1945.

A. ——and then, up to the close of the war, I was a first-class private.

Q. (By Mr. Grean): Now, when you went into the Kempeitai you had to go to Kempeitai school, did you not?

A. There are two classifications. One is to become a noncommissioned officer and one is just a plain member of the Kempeitai.

Mr. Grean: Will you repeat my question, please, and I ask that he answer it.

(Last question above recorded read by the reporter.)

A. Yes, sir.

Q. (By Mr. Grean): How long did you go to that school? [33]

A. From March 25th, that is Showa 20——

(Testimony of Takeshi Tamada.)

The Interpreter: That is 1945.

A. ——and I believe it was around to May 20th. It must have been about two months.

Q. (By Mr. Grean): And how did you rank in the Kempeitai school, Mr. Tamada?

A. Well, it can't be more than medium.

Q. Isn't it true that you ranked third in the Kempeitai school while you were there in attendance?

A. No, sir. No, I didn't have that much ability. Well, if I was around third, why, at that time they would give me either a silver or a gold watch, to a person that ranks up to number ten in the class, and I didn't get any watch.

Q. How many were in the class?

A. The class was divided into two classifications. In my class there was about 30 or 40——

Mr. Grean: And were those—I am sorry. He hasn't finished yet. Let him finish.

The Interpreter: He is trying to explain something. I don't know what he is trying to explain.

Mr. Grean: And what was he saying?

The Interpreter: He wasn't trying to say something. I didn't get his full testimony.

Mr. Grean: Has he finished the answer? [34]

The Interpreter: Yes, sir.

Q. (By Mr. Grean): And how many of those 30 or 40 do you recall took the examination with you to enter the Kempeitai?

A. I didn't quite get the question.

(Testimony of Takeshi Tamada.)

Mr. Grean: I withdraw the question.

Q. How many of those that were members of your class graduated Kempeitai school as members of the military police?

A. The whole class graduated.

Q. And how many of those that were in your class took the examination to enter Kempeitai school at the same time you did?

A. They all entered, they were scattered different places, but they all went.

Q. By "different places" what do you mean, different locations of cities, or different classrooms?

A. I was sent to Nanking, but others were sent to different localities, I don't know where.

Q. That was after you graduated, is that what you are referring to? A. Yes, sir.

Q. Now, what training did you receive in the period that you were in the Kempeitai school?

A. How to capture a prisoner.

How to follow the suspects. [35]

After capturing a prisoner, too, they showed us the method of searching a person.

If there was a crime committed, we were taught how to investigate.

Then we were taught how to use firearms.

I forgot the rest.

Q. Now, when you were dispatched to Nanking as a member of the military police, were your living quarters with the other soldiers that were occupying Nanking or were they in separate quarters of military police?

(Testimony of Takeshi Tamada.)

A. We lived in different barracks.

Q. Now, were you captured as a prisoner of war?

A. No; not exactly I was a prisoner of war.

Q. Were you captured by the enemy?

A. From August, when the war ended, to October of the year, I was still in the Kempeitai, and we got our food from the Chinese, I remember, and in October I suffered from malaria and beriberi, and I went to hospital, and February of next year we left for Japan.

The Court: We will recess until 2.00 p.m.,

(Whereupon a recess was taken until 2:00 o'clock p.m., of the same day, Friday, March 19, 1954.) [36]

Friday, March 19, 1954, 2:00 P.M.

The Court: You may proceed.

TAKESHI TAMADA

the plaintiff, resumed the stand as a witness in his own behalf and, having been previously duly sworn, testified further through the interpreter as follows:

Cross-Examination
(Continued)

By Mr. Grean:

Q. Mr. Tamada, you testified this morning that the man at the reception desk told you that you would be a fool to be just a plain member of the

(Testimony of Takeshi Tamada.)

Kempeitai; that you wanted to be just a plain member because the officer's training course would be longer. Was that your answer?

A. Yes, sir.

Q. Did you take an officer's training course?

Mr. Manes: If your Honor please, I believe he said "noncommissioned officer" this morning and that he referred throughout to a noncommissioned and not to a commissioned officer.

The Court: He can ask him if he took an officer's training course.

A. No, sir.

Q. (By Mr. Grean): Now, you testified this morning, Mr. Tamada, that you voted in 1946, 1947, and 1948, is that correct? [37] A. I did.

Q. Did you tell the Vice Consul when you made application for your passport that you had voted in '46, '47, and 1948? A. I did not.

Q. In fact, you told him that you voted in 1946 and did not vote in 1947 and 1948 and 1949, didn't you? A. Yes, I did.

Q. And then did you give a statement on January 13, 1950, with regard to your army service and your voting? A. At the consulate?

Q. No, no. It was not at the consulate.

Didn't you make a statement on January 13th to anyone regarding your army service and voting, to any representative of the United States Government?

A. I don't remember the date, but it was during January that I was called in to C. I. C. office.

(Testimony of Takeshi Tamada.)

Mr. Grean: May I have marked for identification, please, a document written in Japanese with an English translation attached?

The Clerk: Defendant's Exhibit A for identification.

(The documents referred to were marked Defendant's Exhibit A for identification.)

Mr. Manes: May I see this document first, counsel?

Mr. Grean: You may see it. [38]

Q. I show you the Defendant's Exhibit A for identification, which is entitled a "Han Statement," and I ask the interpreter:

What is the interpretation of the word "Han" in reference to a Han Statement?

Did you hear my question, Mr. Interpreter?

The Interpreter: Yes. I can see that "Han."

Mr. Grean: Yes. What is the meaning of the "Han Statement," if you know?

The Interpreter: It is an abbreviation of something, that is what it is. "Han" is the abbreviation of some word, but I don't know which word it is.

Q. (By Mr. Grean): I show this Exhibit A to the plaintiff and ask if that is his statement.

A. It is my handwriting.

Q. And you wrote this statement in your own hand? A. Yes, sir.

Q. And did you sign this statement?

A. Yes, sir.

(Testimony of Takeshi Tamada.)

Q. And did you at that time say, "I have not voted in the elections held in 1947, 1948, and 1949"?

A. I did.

Q. Did you at that time say, "On 1 December, 1944, I entered the West Division 2nd Troops * * *. I served with the Yari Troops 102 Battalion in Central China Hangchaw up [39] to February, 1946"?

A. This portion—yes, I have.

Q. And did you affirm in making that statement that you would speak the truth, adding nothing and concealing nothing?

Now, that question may be answered yes or no, and I want you to instruct the witness to answer whether or not he affirmed that he would speak the truth, adding nothing and concealing nothing in that statement.

A. I have told him that I would speak the truth and I was told to state everything that I stated while coming to the office on the jeep.

Mr. Grean: May I have marked for identification, please, a copy in the Japanese and English languages?

The Clerk: Exhibit B for identification.

(The documents referred to were marked Defendant's Exhibit B for identification.)

Mr. Grean: And may I have marked for identification a supplement in English and Japanese?

The Clerk: Exhibit C for identification.

(Testimony of Takeshi Tamada.)

(The document referred to was marked Defendant's Exhibit C for identification.)

Mr. Manes: Counsel, please, may I see those?

Mr. Grean: Oh, I beg your pardon.

(Documents examined by Mr. Manes.) [40]

Q. (By Mr. Grean): Now, I show you Defendant's Exhibit C for identification and ask you if you made that statement, contained in Exhibit C, under oath? A. No, I did not.

Q. Is that your signature?

A. Yes, sir, that is.

Q. And is your signature on this document (indicating)? A. Yes, sir.

Q. And in signing that, did you swear that that was the truth? A. No, I did not.

Q. And did you make the statement in this document, "I did not vote in 1947, 1948, 1949. I did vote in 1946"? A. Yes, I did say that.

Q. And was that statement made before Mr. Meloy, the American Vice Counsel?

A. Well, I believe I did.

Mr. Grean: I offer Defendant's Exhibit C in evidence.

Mr. Manes: Object to that on the grounds that it is hearsay and the witness is here and has so testified as to the contents of that document.

Mr. Grean: The witness has testified that he

(Testimony of Takeshi Tamada.)

did not give the testimony in the document under oath, and the document shows that he did.

The Court: It will be received. [41]

The Clerk: Exhibit C received in evidence.

(The document referred to, marked Defendant's Exhibit C, was received in evidence.)

Q. (By Mr. Grean): I now show you Defendant's Exhibit B for identification and ask if that is your signature? A. That is.

Q. And was that information in that document given by you? A. Yes, sir.

Q. And was that information in that document given under oath?

A. I believe I was not sworn.

Q. Did you translate the——

I am calling attention of the witness now to the portion of the document which bears the seal——

The Court: And the attestation clause.

Q. (By Mr. Grean): ——and the attestation clause, signed by D. J. Meloy, Vice Consul of the United States, and ask if that indicates in Japanese that that document was taken under oath.

A. I don't recall seeing that.

Mr. Grean: Let me ask the interpreter if the document bears in Japanese an attestation clause, over the seal and signature of the Vice Consul of the United States.

The Interpreter: In Japanese it says, "Before this [42] officer—official I have signed and I have—I certify I have been sworn."

(Testimony of Takeshi Tamada.)

Q. (By Mr. Grean): And in this document which is Defendant's Exhibit B, in answer to the question, "* * * give date and place of voting and nature of each such election * * *," did you answer, "April 10, 1946"? A. Yes.

Mr. Grean: I offer this document in evidence.

Mr. Manes: I object to that on the ground that the statements therein contained are stated here.

The Court: The objection is sustained.

Mr. Grean: If the court please, here again there has been a denial of the fact that the information given in this document was given under oath. The document has on its face an attestation in Japanese with the seal of the United States and the signature of D. J. Meloy.

The Court: It has been read into the record and his attention called to it. You have that at the present time in the record.

Q. (By Mr. Grean): Now, on the 13th of January, 1950, did you make another statement later that day?

A. The statement I just testified about?

The Court: I would proceed by way of refreshing his recollection, counsel. Of course you got your attestation clause in there. Let him read it over the signature. [43]

Mr. Grean: May I have marked for identification a statement in Japanese and in English?

The Clerk: Exhibit D for identification.

(The documents referred to were marked Defendant's Exhibit D for identification.)

(Testimony of Takeshi Tamada.)

Mr. Grean: Counsel, would you like to examine this document?

Mr. Manes: Yes.

(Mr. Manes examines document.)

Q. (By Mr. Grean): I show Defendant's Exhibit D for identification to the witness and ask if that is his "Han Statement" in his writing.

Mr. Manes: I object to that question as to form, on the ground that it was not ascertained by the question whether that statement was rendered voluntarily.

The Court: The objection is overruled on that ground.

Ask him if it is his signature, counsel, and not ask the type of statement it is. It will speak for itself, if it is necessary. Just ask him if it is his signature.

Mr. Grean: I will withdraw the last question.

Q. And I ask you if that document bears your signature? A. Yes, sir.

Q. And was that document written by you in your hand? A. Yes, sir.

The Interpreter: I may explain about that [44] "Han Statement" if you want now what the meaning is.

Mr. Grean: Do you recall the meaning of the "Han Statement"?

The Interpreter: The Han Statement. "Han" is a fingerprint or print, and after they make a

(Testimony of Takeshi Tamada.)

statement they will put either their thumb or their other fingerprints on it.

Q. (By Mr. Grean): Now, in that statement, Mr. Tamada, did you say, "In February, 1945, I voluntarily took an examination to enter into the Kempeitai and passed"?

The Court: Let him see the statement, counsel.

Mr. Grean: Let him see the statement?

The Court: Yes.

(Mr. Grean hands exhibit to the witness and interpreter.)

Mr. Grean: I don't know which page it is on.

A. Yes, I did.

Q. (By Mr. Grean): And did you in that statement state, "I, Tamada, Takeshi, made a false report to the United States Consulate, United States Court, and again made a false report today in my statement"?

Ask him that much. That is right here (indicating). A. Yes, I did.

Q. And the false statement that you were referring to when you made that statement, was that with respect to the number of times and the dates that you voted? A. That may be one of them. [45]

Q. Now, in that statement did you state, "I voted in the April, 1946, election on 1 occasion and in 4 occasions in the elections held in April, 1947. I voted voluntarily to assist the recovery of Japan"? Did you make that statement?

(Testimony of Takeshi Tamada.)

(Mr. Grean indicates on document to the interpreter.)

A. Yes, I did.

Q. And did you at that time state, "The reasons for my entry into the Kempeitai was to render greater service of Japan's war effort and at the same time keep in line others who were carrying out their duties," and did you further state, "In the Kempei school I ranked 3rd"?

A. Yes; I don't know whether I wrote it in Japanese or not, but I have been forced to say that.

Q. Look at the Japanese and see if you wrote it in your own hand in Japanese.

A. I don't recall writing such a thing and I can't find it here in Japanese.

Q. Turn the page, turn the page and see if you can find it on the other side?

A. Yes, it is in the Japanese also.

Q. And you made that statement?

A. Yes, sir.

Q. Now, a moment ago, Mr. Tamada, I asked you if you made the statement regarding a false report with respect to the dates and the number of times you voted, and you said [46] that was partly the reason. Do you have another reason?

A. I was afraid that if I would mention all the times that I voted, that I would lose my American citizenship and wouldn't be able to receive my passport, and that was the chief reason of not receiving my papers, I was afraid of that, and at that time I was so anxious to return to the United States.

(Testimony of Takeshi Tamada.)

Q. Now, while you were at the Hiro Arsenal manufacturing—where they were manufacturing these airplane parts, did you take an oath or repeat an oath each day?

Mr. Manes: I object to that as immaterial.

The Court: Objection overruled.

A. I don't believe I took oath in the morning.

Q. (By Mr. Manes): Did you take one at any time during the day?

A. There was in the shop a large frame with words on it, and in those words it gives the duties of all those who are serving in the army.

Q. And did it say, "I will do my best for the Emperor and endeavour Japan to crush the United States"?

The Interpreter: What was that question again?

(Mr. Grean indicates on paper.)

A. Is that on the frame, the wording in the frame?

Q. (By Mr. Grean): I am asking, was that the wording in the frame? yes. [47]

A. I don't recall seeing such wording in the frame.

Q. And did you take such an oath each day?

A. No, sir, I did not swear.

Q. Now, calling your attention again to Defendant's Exhibit D for identification, I ask you if you made the statement:

"In December, 1941, I was mobilized and drafted

(Testimony of Takeshi Tamada.)

as machine technician at the Hiro Arsenal. This Arsenal was supervised by the Japanese Navy and manufacturing airplane parts. I repeated the following oath every day, 'I will do my best for the Emperor and endeavour Japan to crush the United States.' I repeated this oath voluntarily, and with pride."

Was that statement yours? A. I did.

Mr. Grean: Now may I have this marked for identification, please?

The Clerk: Exhibit E for identification.

(The document referred to was marked Defendant's Exhibit E for identification.)

Q. (By Mr. Grean): I show you Defendant's Exhibit E for identification, which is a photostat, a photostatic copy of what purports to be a military service record, and I ask you to examine that record and see if it pertains to you. [48] A. Yes, sir.

Q. Now, on that document there appears under your name, which is given as "Tamada Takeshi": "4th son of Toshisuke." Will you tell me if that language appears under your name?

A. That "Toshisuke" is also pronounced as "Jesuke." That is my father. Yes, fourth son.

Q. And were you the fourth son of your father?

A. Yes, sir.

Q. You have testified that when you went to Japan, you went with an older brother, two sisters, and a younger brother, in addition to your mother.

A. Yes, sir.

(Testimony of Takeshi Tamada.)

Q. Did you have any brothers that did not go to Japan with you?

A. Two remained in Hawaiian Islands.

Q. And they were two brothers that were older than you? A. Three.

Q. The two? I was referring to the two that remained in the Hawaiian Islands.

Then you have three brothers that are older than you? A. Yes, sir.

Q. Now, further appearing on this military service record which is Defendant's Exhibit E for identification is the statement, "Enlisted with the Replacement Unit, 11th [49] Infantry Regiment, on active service on 1 December, 1944." Will you tell me, in looking at the military service record in Japanese, if that is a proper translation?

A. That is a correct translation.

Mr. Grean: Now, is the witness volunteering information or is that a further answer to the last question?

The Interpreter: No. He is just trying to explain some of these wording—"the Infantry"—for you. It is not an answer. He is trying to explain some of the wording.

Q. (By Mr. Grean): You may state his explanation, if you desire.

A. The "11th Infantry" it says on that is actually, in Hiroshima—it had another name in Hiroshima. It was the 2nd Battalion. Formerly it had been using the name of "11th Infantry" but later

(Testimony of Takeshi Tamada.)

on it had been changed, the name had been changed.

The Interpreter: He wanted to explain that.

Q. (By Mr. Grean:) To "Western #2 Regiment," is that right?

A. Well, it had been changed, but I don't know when it had been changed.

Q. Now, in your statement contained in Defendant's Exhibit B for identification, which you have testified as being yours, you stated that you were transferred to the "Spear" Unit on January 20, 1945. What was the "Spear" Unit? [50]

A. That was the name of the Butai, that is the outfit we entered, and it is a Spear, that means that it was the name of the outfit we entered at that time.

Q. That outfit was known also as the Independent Infantry of 102 Battalion, wasn't it?

A. The 102 Battalion was the same as the Yari outfit.

Q. And the term "Yari" or "Spear" was a particular nickname for that outfit?

A. Oh, they had different nicknames for the different battalions in the infantry.

Q. And do you know how it got the name of "Yari Battalion" or "Spear"?

Mr. Manes: I object to this line of questioning on the grounds it is wholly immaterial and irrelevant.

The Court: Objection overruled.

A. I do not know.

(Testimony of Takeshi Tamada.)

Oh, that name was there before I entered the army.

Q. (By Mr. Grean): Now, Mr. Tamada, in your statement to the Vice Consul, of November 3, 1949, which is Defendant's Exhibit B for identification, you stated that you voted in 1946 and your reason for voting was that "Mr. Okamoto * * * urged to all to vote"? A. Yes, I did.

Q. And you gave as your reason for voting, "Newspapers and radio broadcasts and various civic group campaigns urging [51] to vote made me do so. Since this was the first time election was held, I became confused and voted unknowingly regarding my citizenship." A. Yes.

Q. Now, were you still confused when you voted four times in 1947?

A. Yes, I have been confused.

Q. And were you confused on each of those four occasions?

What is his answer to that question?

The Interpreter: He hasn't answered yet.

A. I couldn't say how much I was confused.

Q. (By Mr. Grean): And were you confused when you voted in 1948?

A. I don't believe I was confused in '46, '47, and '48.

Mr. Manes: May I have the answer to the last question, please?

The Interpreter: "I don't believe I was confused in 1946, 1947, or '48."

(Testimony of Takeshi Tamada.)

Q. (By Mr. Grean): You were just confused in 1946, is that correct?

A. I don't know how much I was confused, but, of course, I had something worrying me.

Q. Now, in Defendant's Exhibit A, which is the first statement which you made on January 13, 1950, you stated, [52] "On around March I attended the Village People's Meeting where both Sunahara and Okamoto made speeches."

And in Defendant's Exhibit D, which is dated the same date, you said, "I have never participated at the Village People's Meeting together with Sunahara * * *, nor have I heard the speech made by Okamoto * * *."

Now, which statement is true, Mr. Tamada?

Mr. Manes: I am going to object to that question on the ground that it has never been established whether Exhibit D was voluntarily rendered.

The Court: Objection overruled.

A. Yes, I think I did make two different statements.

Q. (By Mr. Grean): I ask which of those statements was true.

A. In this one which says "Sunahara"—I attended the meeting with Sunahara. He did not speak. Okamoto spoke.

Q. Then your statement now is that Defendant's Exhibit A for identification contains the truth, and Exhibit D does not?

A. This is the truth (indicating document).

Mr. Grean: I offer Exhibit D in evidence.

(Testimony of Takeshi Tamada.)

Mr. Manes: I object to it on two grounds. that the witness is here to testify as to statements contained therein, and, secondly, because it has never been established whether that statement was rendered voluntarily. [53]

The Court: Well, the objection is sustained. In response to the questions, he has attempted to explain the inconsistencies. He has testified that he made the statement but that it was not true. Putting it in evidence doesn't add anything. Of course, as to your objection with respect to the question of whether it was voluntarily made, not considering that objection, he apparently was confused with the rule with respect to the voluntary character of confessions in criminal cases, and this was not a criminal case nor is this supposed to be a confession, and so it is not necessary to establish the voluntary character by going into it. However, it is the same question we had before. Where a witness has made a statement and he admits that he made that statement, then a writing is not admissible.

Where he has made a statement and denies that he made that statement, then of course it is admissible to prove that he did make the statement.

In these cases where he admits the signature, then he has made the foundation for the admission of the statement. But, of course, when he admits that he made the statement, then it is not admissible.

Mr. Grean: I accept the court's ruling and thank the court for pointing out the basis of the ruling.

(Testimony of Takeshi Tamada.)

Q. Mr. Tamada, you have been a Japanese citizen since birth, is that true? [54]

A. Yes, I was a Japanese national.

Q. Were you taught in school, Mr. Tamada, that the Japanese Emperor was supreme?

Mr. Manes: Objection on the ground it has been asked and answered.

Mr. Grean: Not in this case.

The Court: It will be overruled. I don't recall his answer. That question can be answered.

Mr. Grean: It has not been answered in this case, your Honor.

A. I did.

Q. (By Mr Grean): And were you taught in school that it was an honor to die for the Emperor?

A. Yes, sir.

Mr. Grean: I have no further questions.

Mr. Manes: If the court please, I have some questions.

The Court: All right. We will take a five-minute recess.

(Recess.)

The Court: You may proceed.

Redirect Examination

By Mr. Manes:

Q. Going back to your testimony earlier today, Mr. Tamada, did you own any land in Japan before the war? A. No, sir, I have not.

Q. Did you own any land during the war? [55]

A. No, sir.

(Testimony of Takeshi Tamada.)

Q. Did you ever purchase any land while you were in Japan?

A. After the war there was what they call a farm reform in Japan, and the property, the farm was in my older brother's name, and my older brother became an absentee landlord, and I happened to be on the farm, and at that time, according to that farm reform, the government will take over the land of an absentee owner and would sell it to the tenant of the farm. And the government transferred the title to my name and I paid the government, and the government will turn over the purchase money to my older brother.

Q. Was that transfer the result of the land reform law proclaimed by General MacArthur?

Mr. Grean: I object to the question on the ground that it is immaterial.

The Court: Objection overruled.

A. Yes, sir.

Q. (By Mr. Manes): Now, you stated that you worked at the naval arsenal in Japan around October 1, 1941?

A. In 1941, is that Showa? 16.

The Interpreter: In Showa 16, and it corresponds to our calendar 1941.

Q. (By Mr. Manes): Now, what was your purpose in working at the naval arsenal? [56]

A. I had to help my family because my family had financial difficulty.

Q. And while you were working in the naval

(Testimony of Takeshi Tamada.)

arsenal, did you receive any orders from the government causing you to remain in the arsenal, remain working in the arsenal, that is?

A. Yes. It came.

Q. Approximately how soon after your employment did you receive such an order?

A. It must have been about two months after I started working.

Q. And from that time until the time that you were drafted into the Japanese Army, you remained in the arsenal because of this order, is that correct?

A. Yes, sir.

Q. You also stated in reply to counsel for the defendant's question that you received some kind of military training while you were in school. Was this a part of the curriculum of the school, was it a required course, or did you volunteer for that?

A. It is a subject which is compulsory.

Q. And did all students have to participate in it, or was it just voluntary for all the students?

A. The whole students.

Q. You also explained to the court that you were [57] promoted while you were in the army. I will ask you whether or not you know what you did to earn such a promotion, if anything.

Mr. Grean: I object to the question as calling for a conclusion of the witness.

The Court: Overruled.

A. Those who had——

The Court: That is not responsive. It can't be

(Testimony of Takeshi Tamada.)

responsive. He is asked what he did to earn promotion, if he knows. He can either testify what he did or he doesn't know, one of the two.

Mr. Manes: If he did anything to earn it, I said.

The Court: Read the question.

(Pending question read.)

A. No, sir.

The Court: By "No, sir," do you mean you do not know?

A. I never did do anything to get it.

Q. (By Mr. Manes): Nothing that you know of, that is, is that correct?

A. I never did do anything.

Q. Now, on January 13, 1950, you purportedly gave a statement, which was given in Hiroshima, after you had already been to the Consul, and you have identified this signature as your own, is that correct?

The Court: Identify the document, counsel. [58]

Q. (By Mr. Manes): This is Exhibit D for identification, on which you have identified the signature as your own, is that correct?

A. Yes. I remember making it.

Q. Yes. Now, as a matter of fact, you gave two statements on that day, did you not?

A. I do not know how many statements, but—I do not know, no.

Q. Well, you gave the statement on the 13th of January, 1950, which is Exhibit D, and you also

(Testimony of Takeshi Tamada.)

made a statement which is noted in Exhibit A for identification, also dated on the 13th of January, 1950, and which you have identified. Do you recall that? A. Yes.

Q. I wonder if you will explain to the Court what the circumstances were on that particular day that led you to make those two statements, if you recall?

A. I have been pressed to make that statement.

Q. What was the beginning, were you visited by somebody on that particular day?

A. The C.I.C. had.

Q. Someone from the C.I.C. came to visit you?

A. Around the early part of January, 1950, a member from the C.I.C. came to the house.

Oh, a man in a jeep came to the office, and he told me [59] that, "Your application will be approved but we have further more things to put in the application."

And he took me on the jeep and while on our way he made me make statements and he put down in writing.

And then after we got out, he had a paper there and he told me that everything I said in the jeep is on the paper, and me to sign it.

Q. Now, I will ask you whether or not the paper to which you refer is Exhibit A for identification, Defendant's Exhibit A for identification.

A. I am not sure whether this was the statement or not. Yes, I believe this was the statement.

(Testimony of Takeshi Tamada.)

Q. When was the last time you saw this paper, Mr. Tamada?

The Court: He is referring to Exhibit A there now?

Mr. Manes: Exhibit A for identification, Defendant's Exhibit A for identification.

The Court: Was that offered in evidence?

Mr. Grean: No, it wasn't, your Honor.

The Court: If it is offered in evidence it will be admitted now.

A. After I made that statement, I don't remember I ever saw it.

Q. (By Mr. Manes): After that statement was given, Mr. Tamada, what happened then, if anything? [60]

A. When he told me to sign it, what I stated in the jeep, after I did sign it, he said, "Well, this will be all right, now, you will get your application approved, so I hope you a good voyage."

And the man told me, "I understand that you have been a Kempei, Kempeitai."

I told him no, I wasn't

And he showed me a paper and he said, "Is that a different person?"

And then I was struck five or six times.

Then he told me to write down frankly everything about my army life and about Imperial family.

And then he referred to this matter, this frame which is hung at the shop, and "I understand you have finished the Kempei class as a third best grade."

(Testimony of Takeshi Tamada.)

And he told me to write all these things which I didn't have in mind, that is, everything against the United States and everything for Japan.

And the next time I was called in was around September, October, and I was questioned at the time that who struck me and then what step I took.

Q. Who called you in, in September or October of 1950?

A. The Japanese police came over and notified me to appear at the C.I.C.

And then I was questioned at that time on who struck me [61] and what step I took in my application.

He asked me something about the Japanese-American Center, and he asked me who my attorney was.

I have been questioned so severely that I became ill and fainted—well, about two times I felt bad and fainted.

And then I was told to appear every day for four or five days consecutively. And then I may have written something at that office also. I am not sure about that.

Q. During these four or five days were you interrogated by members of the C.I.C. about the statements that you had made on or about January 13, 1950?

A. Yes, they have asked me about my statements.

When I first visited the C.I.C., when I was struck, there was another soldier present. The soldier standing by said he was struck by a Japanese soldier with a belt and with a slipper.

(Testimony of Takeshi Tamada.)

Mr. Grean: I am going to ask that the last statement go out of the record as being hearsay.

The Court: It may go out.

Mr. Grean: I am going to further move to strike that portion of the record that has to do with anything that occurred at dates after January 13, 1950, as being immaterial, irrelevant, and having no bearing on any of the issues in the case.

The Court: What was the last date of those statements? [62] Were those after the date of January 13th?

Mr. Grean: These statements all apply to September and October when he was called in by the police and questioned as to who struck him. That has no bearing as to any documents or any of the issues in the case.

The Court: I am asking about the statements that he has been interrogated on. What was the last date of those statements?

Mr. Grean: The last date of the statements was January 13, 1950.

The Court: January 13, 1950, of all of the statements that he made?

Mr. Grean: That is correct.

The statements to the consulate were made in November, 1949.

The Court: What is the purpose?

Mr. Manes: We are attempting to show that not only was this particular document, Defendant's Exhibit D for identification, not rendered voluntarily, but that in the course of events severe pressure was

(Testimony of Takeshi Tamada.)

put on the plaintiff with respect to the information which was offered under this document.

The Court: Well, how could anything that occurred subsequent to the time that he signed that document have influenced him into the signing of the document? [63]

Mr. Manes: The events which are subsequent simply contain or are cumulative in terms of the pressure that was put on him beginning January 13th, to show that there was a system applied to him.

The Court: That may all go out.

Of course it is not cumulative because it doesn't tend to prove or disprove anything that was required at the time that occurred. In other words, if he made the statements in January, 1950, anything that happened subsequent to January, 1950, couldn't in any way have induced him to have made the statements in January, 1950.

Mr. Manes: That is correct, your Honor, but I am just trying to show this court that there was an intent here to disturb and molest the plaintiff's rights, by the Government.

The Court: Well, anything subsequent to the date of the statements in 1950 is not admissible for the purpose of proving that he was coerced or that duress was used in his making of these statements.

Mr. Manes: I would like to refer to the other objection that was made as to the testimony just rendered regarding a remark made by a soldier who was present while the plaintiff was being struck. As

(Testimony of Takeshi Tamada.)

to that particular information, I think it goes to the question of what the reason was for striking the plaintiff.

The Court: What was the date of that? [64]

Mr. Manes: That was on January 13, 1950, at the time that this statement was signed, and which you ruled should go out.

Mr. Grean: What the Court ruled may go out was the statement he made attributable to another soldier, that the Japanese soldier had been struck with a slipper and a belt.

Mr. Manes: We are not offering it for the truth of what it means. We are simply saying that this particular person believed that this was the reason why he was struck.

Mr. Grean: I certainly object as to the materiality.

Mr. Manes: I am not offering it for the truth that the Japanese soldier struck another individual. It is immaterial, too, I agree.

The Court: Counsel, as a matter of fact, it isn't clear to me. I intended to question him myself. It isn't clear to me as to who struck him. He testifies he was struck. I made a note here that he was struck five or six times. I have never been able to follow the testimony close enough to know who struck him.

Mr. Manes: We can attempt to clarify that now for the Court.

Mr. Grean: If we can.

The Court: Well, let us go into that.

Mr. Manes: Very well.

(Testimony of Takeshi Tamada.)

The Court: And rule later on your other question with [65] reference to what occurred.

Of course, if this was all simultaneous, then it would be a little different.

Ask him whom he refers to when he refers to the C.I.C.

A. He was a member of the C.I.C. I believe C.I.C. is the Intelligence Corps.

Q. (By Mr. Manes): Do you remember what the name of the man was?

The Court: Just a moment. I want him to clear up whom he considers to be the C.I.C., whom he is referring to when he says "the C.I.C." I can't tell now whether he contends that the American officials beat him up, the Japanese officials beat him up, or who beat him up. You just have it in such a confused state that it is impossible for me to learn who struck him.

Mr. Manes: Well, we will try to clarify it, your Honor.

Q. You stated, Mr. Tamada, that somebody struck you on or about January 13th.

The Court: First, will you clear up whom he is referring to when he says "C.I.C."?

Mr. Manes: Yes, your Honor. That is what I was leading to.

Q. Now, who do you mean by "a member of the C.I.C." that struck you?

A. I believe he belonged to the soldiers. He is a [66] soldier.

Q. Was he an American soldier?

(Testimony of Takeshi Tamada.)

A. Yes, sir.

Q. Was there anybody else with him at that time, when he struck you?

A. There was another soldier.

Q. Do you recall what the name of the soldier was that struck you? A. I do not.

Q. Was the other soldier also a member of the C.I.C., the one that was watching?

The Court: Excuse me just a minute for interrupting, counsel. Now you are referring to the C.I.C. I still want to know what the C.I.C. is, what he means by "the C.I.C.." and you keep asking him as to the C.I.C., and I want to know what it is.

Q. (By Mr. Manes): What is the C.I.C., Mr. Tamada? A. I believe it might be an M.P.

The Court: Just a moment, counsel. Let me ask: Whom do you mean when you refer to "C.I.C."?

A. It is attached to the Army, attached to the Army of the occupation force.

The Court: Does "the C.I.C." mean the occupation forces?

A. Attached to the occupation force.

The Court: Is it a police force? [67]

A. I am not certain. In Japan it had been referred to as "Intelligence Corps."

The Court: Oh, in other words, you are referring to the Intelligence Corps of the United States Army? A. Yes, sir.

The Court: All right. You were struck by a member of the Intelligence Corps of the United States Army? A. Yes, sir.

(Testimony of Takeshi Tamada.)

The Court: When?

A. It was in 1950, sometime in January.

The Court: Before or after you made this statement of January 13, 1950?

A. It must have been about the same date, on the 13th.

The Court: Where were you at the time?

A. I lived at my home at the time.

The Court: No. Where were you at the time you were struck? A. At Hiroshima, Hiro-machi.

The Court: Were you in the street or in an office? A. I was in the C.I.C. office.

The Court: At Hiroshima?

A. At Hiroshima, Hiro-machi.

The Court: All right. Go ahead.

Q. (By Mr. Manes): Now, referring to the time that you were struck, were you struck before or after you rendered [68] this statement, Exhibit D for identification?

A. I wrote this after I was struck.

Q. How soon after you were struck?

A. Soon after I was struck.

Q. When you had written this statement, had you not been struck?

A. If I wasn't afraid of being beaten up again, I wouldn't have written that statement.

Q. And you never intended to profess any loyalty for Japan as against the United States, is that correct? A. No. I did not have.

Mr. Manes: No further questions.

(Testimony of Takeshi Tamada.)

Recross-Examination

By Mr. Grean:

Q. Did the man in the jeep that came to the office speak Japanese?

A. Oh, there was an interpreter with him.

Q. How many people were there, all together, in the jeep?

A. The soldier and the interpreter and myself.

Q. And did the soldier tell you what to state or did the interpreter tell you what to state?

A. The interpreter did.

Q. Now, you have testified with regard to Exhibit A and Exhibit D, that the Japanese was written entirely in your [69] own hand, is that correct?

A. Yes, I did write it.

Q. Now, were you struck before you signed and wrote out Exhibit A for identification?

A. I believe this had been signed before I was struck.

The Court: Referring to what?

Mr. Grean: Defendant's Exhibit A for identification.

Q. Now, when he asked you if you had not been a member of the Kempeitai, you testified that you told him that you had not been, is that true?

A. Yes, sir.

Q. And you also told him that you had not voted in 1947, '48, and '49, but you had only voted in 1946? A. Yes, sir.

(Testimony of Takeshi Tamada.)

Q. And he said, "No. You have been a Kempeitai"? A. Yes, sir. He said that.

Q. And he said, "You have voted in 1947 in addition to 1946," didn't he say that?

A. Yes. He said that.

Q. And you denied that, and then he struck you, is that the truth? A. I believe so.

Mr. Grean: No further questions.

I offer in evidence Exhibits A and D.

The Court: They will be received. [70]

Mr. Manes: I object to them. I object to those for the same reason I did before, your Honor.

The Court: Objection overruled. They will be received.

(The documents referred to, marked Defendant's Exhibits A and D, respectively, were received in evidence.)

The Court: May I see Exhibit A?

Referring to Exhibit A in the Japanese writing, is that your handwriting? A. Yes, sir.

The Court: Did I understand you to testify a moment ago that you had been asked these questions in the jeep and then they had been written down and Exhibit A had been presented to you after you got out of the jeep? A. Yes, sir.

The Court: Is that what he wrote in the jeep?

A. He made me write what I stated in the jeep.

The Court: Did you write this in the jeep?

A. Not in the jeep.

The Court: As I understood your testimony, you

(Testimony of Takeshi Tamada.)

testified that he asked you all these questions in the jeep, that he wrote them down, and when you got out of the jeep he said, "Here they are," and had it all written down, is that correct?

A. He told me after we got off the jeep to put down everything what I have stated in the jeep and to sign it. [71]

The Court: He didn't write it down at all, is that it? A. No. I wrote them.

The Court: Who was present at the time you were struck?

A. There was a soldier and an interpreter.

The Court: Was that at the time you signed this document?

A. And the interpreter told me to put my fingerprint on a portion that was not correct.

The Court: Well, is that when you were struck, when you put your thumbprint on it?

A. They took the paper after I signed it and went back and read it and then I was struck.

The Court: All right. Do both sides rest?

Mr. Manes: I would like to ask one or two more questions, your Honor.

The Court: All right.

(Testimony of Takeshi Tamada.)

Redirect Examination

By Mr. Manes:

Q. Will you please tell us and tell the Court, if you can remember, why you told the American soldier that you were not a member of the Kempeitai?

A. I was afraid if I admitted I was a Kempeitai, I wouldn't be able to return to the United States.

And, of course, he told me when I got on the jeep that "Your application will be approved but there are a little [72] further statement we want to take from you."

Mr. Manes: I have no further questions, your Honor.

The Court: Any argument?

Mr. Grean: I have no argument, your Honor.

The Court: Any argument, Mr. Manes?

Mr. Manes: I would like to say one thing, your Honor, please.

I think here, your Honor, we have the question presented as presented last Tuesday in the Matsuye case, substantially the same issues. The only element involved that was different there is the question of these conflicting statements that were made in the various exhibits that were offered into evidence by defendant.

I think that we understand from our past experience the feeling that many of these Japanese-Americans had in those days, as to why they had the

(Testimony of Takeshi Tamada.)

intense desire, which this court has recognized in the past, to return to the United States. In many instances it has been so overwhelming that they have wanted to return and have lied to do so. It has been recognized in other courts and recognized here.

I think that the profession of loyalty for Japan, however, that was to be found in Exhibit D for identification, does not bear up under the evidence that has been offered prior to that time. And I think that, if the court will read it, it will see for itself that it is more like a [73] confession and you will see some of the reasons, because it is just unbelievable, when you read it, that a man voluntarily makes these statements, where his whole course of conduct has been different up to that point, having been used to brutality. I think it is difficult to understand the reason why he gave this particular statement and that, on January 13, 1950.

That is all I have.

The Court: It was rather difficult to follow him because he has lied so much. Of course he stands impeached now, and he frankly stated then that he had lied. He frankly states now that he told lies, and he frankly states that he told lies because he was afraid he might be deprived of his citizenship if he did not tell a lie.

Mr. Manes: Because he voted in 1947 and 1948, your Honor, and because he was a member of the Kempeitai. There weren't many Japanese-Americans there who did not know what the Kempeitai situation was. It isn't illogical to understand.

(Testimony of Takeshi Tamada.)

The Court: All I am referring to is the question of impeachment.

Mr. Manes: I understand, your Honor.

The Court: He has stated that he lied to save his citizenship.

Mr. Manes: That is right. [74]

The Court: Now, here he was sitting on the stand and, in so far as his case is concerned, it is dependent upon his credibility. He has stated that he lied to save his citizenship, and that is the thing, the question of his citizenship, that is in issue here.

The judgment will be for the defendant.

Counsel will prepare findings. [75]

In the United States District Court, Southern District of California, Central Division

No. 10455-WB (D)-Civil

TAKESHI TAMADA,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State,

Defendant.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on Friday, March 19, 1954, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of April, A.D. 1954.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed July 26, 1954. [76]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages contain the Complaint; Answer; Stipulation and Order for Substitution of Party Defendant; Minutes of the Court at Time of Trial; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Designation of Record on Appeal which, together with the original exhibits and reporter's transcript of proceedings on trial, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 26th day of July, 1954.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14457. United States Court of Appeals for the Ninth Circuit. Takeshi Tamada, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 27, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14457

TAKESHI TAMADA,

Plaintiff and Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant and Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Pursuant to Rule 17(6) of this Court, appellant files the following as his statement of points on appeal:

1. The trial court erred in giving judgment for defendant;

2. The trial court erred in failing to adjudge that plaintiff is a national of the United States and did not lose that nationality by reason of his having served in the Japanese Army during World War II and by reason of his having voted in elections in Occupied Japan;

3. The trial court erred in admitting into evidence, over plaintiff's objections, defendant's Exhibits "A," "C" and "D";

4. The trial court's finding numbers XI, XV,

XVII, XVII and XIX are not supported by the evidence;

5. The trial court erred in its conclusion numbers II, III, IV, V and VI.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Plaintiff and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 6, 1954.

No. 14457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

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No. 14457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

The complaint [R. 3] was filed pursuant to Section 503 of the Nationality Act of 1940 (8 U. S. C. 903)[1] giving the District Court for the Southern District of California, in which appellant claimed to be a permanent resident [R. 3], jurisdiction over an action for a declaration that a person who has been denied a right or privilege as a national of the United States is a national of the United States.

This is an appeal from a judgment entered by the District Court [R 17-19] adjudging that appellant lost his

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[1]Preserved by the savings clause, section 405a of the Immigration and Nationality Act of 1952; note to 8 U. S. C. 1101.

United States citizenship by serving in the Japanese army and by voting in Japan [R. 18] and that therefore appellant was not entitled to rights or privileges of a national of the United States or to a passport to return to the United States.

This court has jurisdiction under the provisions of 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Facts.

Appellant was born in Hawaii on September 5, 1924 [R. 22]. He was thus by United States law (14th Amend.) and by Japanese law [R. 12; Ex. C], a citizen of both countries by birth. In 1933, at the age of 8, he was taken to Japan by his parents [R. 23], accompanied by an older brother, two younger sisters and a younger brother [R. 23]. Two other older brothers remained in Hawaii [R. 62]. Both parents and the older brother died in Japan [R. 37-38]. The two sisters are now living in the United States [R. 37]. The younger brother is in the United States Army [R. 37-38]. The purpose for which appellant was taken to Japan was to learn the Japanese language [R. 23]. The intention was that he was to finish grade school in Japan, take up an agriculture course and then return to the United States [R. 23].

The war broke out when appellant was 17 years of age [R. 3].

In December, 1944, appellant was drafted into the Japanese Army [R. 27-28, 43]. This was compulsory, pursuant to Japanese law, with criminal penalties provided in the event of violation [R. 35-36; Ex. 16, *Matsuye*

case].[2] The law of Japan on military service, in evidence in this case, is set out hereafter as Appendix "A." Appellant feared that if he refused to go into the army, he might be punished; he feared harm to his family with whom he was living [R. 27], and he feared the Military Police who were pretty much in charge of affairs in Japan at that time [R. 41]. Appellant was in the Japanese Army until the end of the war, and was sent back to Japan from China [R. 31] in 1946 [R. 33].

After the war, appellant voted in the occupation ordered elections of 1946, 1947 and 1948 [R. 33]. He did so because General MacArthur was the head man [R. 33], and the orders came from MacArthur's office that all should go to vote [R. 33]. Appellant feared loss of ration privileges if he did not vote and the second head man of the village told him that he must go and vote [R. 33]. Since the orders to vote came from General MacArthur's office, appellant feared for his status as an American if he did not obey them [R. 34].

The nature of and conditions in Japan at the times here involved are matters of which this and the lower court can take judicial notice. The documentary exhibits paint the picture. Extracts or summaries from some are set out below in Appendix "B."

In early 1949, appellant applied at the American Consulate in Japan for a passport to return to the United

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[2]Because of the number of cases of this nature before the District Court and the amount of exhibits ordinarily introduced, by stipulation of counsel and with the consent of the court, the bulk of the exhibits were introduced by reference to other cases wherein the exhibits themselves were introduced. The reference to the *Matsuye* case is to No. 1232 N. D. of the District Court below. By stipulation of counsel, copies of the actual exhibits are before this Court in this case.

States [R. 35]. This was refused and instead, the American Vice-Consul issued to appellant, a Certificate of the Loss of the Nationality of the United States [R. 35].

Hence the lawsuit.

Statutes Involved.

8 U. S. C. 801(c) and (e) provide in pertinent part:

> "A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by:
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> (e) Voting in a political election in a foreign state . . ."

Questions Involved.

1. Did the Government carry its burden, whether that burden be to show the expatriation of this American born citizen by clear, convincing, unambiguous evidence to have been voluntary, or whether its burden was to overcome the presumption that appellant's military service was involuntary by reason of his having been drafted into the Japenese Army pursuant to the compulsory Japanese Military Service Law? And, irrespective of what the Government's burden may be, was appellant's military service voluntary?

2. Assuming this court holds that appellant's military service was not voluntary and therefore that he did not lose his American Nationality by reason of that service, should this court decide the voting issue or should it remand the case to the District Court, as was done in *Perri v. Dulles,* 206 F. 2d 586 (C. A. 3, 1953), so that appel-

lant may take the oath prescribed by the Watkins Act (Public Law 515, 83d Cong.; 66 Stat. 240.)

3. If the court feels it should decide that issue, were appellant's acts of voting in Occupied Japan voluntary?

Specification of Errors.

1. The trial court erred in giving judgment for defendant.

2. The trial court erred in failing to adjudge that plaintiff is a national of the United States and did not lose that nationality by reason of his having served in the Japanese Army during World War II or by reason of his having voted in elections in Occupied Japan;

3. The trial court erred in admitting into evidence, over plaintiff's objections, Defendant's Exhibits "A," "C," and "D." Said exhibits were objected to on the grounds that they were hearsay, and that the witness testified as to the contents of the documents [R. 54, 81]. Exhibit "D" was additionally objected to on the ground that it was not voluntarily made [R. 66].

4. The trial court erred in finding that appellant's service in the Japanese Army was his free and voluntary act. Said finding [XV] is not supported by the evidence, and is clearly erroneous.

5. The trial court erred in finding the appellant's voting were his free and voluntary acts. Said finding [XVII] is not supported by evidence and is clearly erroneous.

6. The trial court erred in its conclusions IV, V and VI. 8 U. S. C. 802, upon which conclusion IV is predicated, has no application to involuntary military service. Conclusions V and VI are that appellant acted voluntarily as to both the army and election issues. This is contrary to the law on the subject.

ARGUMENT.

Summary of Argument.

1. There can be no expatriation from American citizenship unless the citizen acts voluntarily. In cases such as these the Government's burden is to show such conduct by evidence that is clear and convincing and not such as to leave the issue in doubt. Such evidence the Government did not produce here. Or, at the least, the Government's burden is to overcome the presumption that the citizen acted involuntarily. Since appellant was drafted into the Japanese Army pursuant to law, the presumption is that his service was involuntary. Accordingly, judgment must be for the citizen since the government produced no evidence overcoming the presumption. And, in any event, on the ordinary burden of proof, appellant showed his service to have been involuntary. The trial court's holding to the contrary is clearly erroneous.

2. Subsequent to the time judgment was entered in the within case, the 83d Congress passed Public Law 515, popularly known as "the Watkins Act" (66 Stat. 240). This Act provides a simple oath procedure to restore citizenship to those who purportedly lost it by reason of having voted in the elections held in Occupied Japan. If the court agrees that appellant did not lose his United States nationality by reason of his Japanese military service, the voting question need not be decided, but the case should be sent back to the District Court to permit appellant to take the oath of the Watkins Act.[3]

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[3]It is believed that counsel for appellee have no objection to this procedure.

4. If the court feels the procedure just suggested is not correct or feasible, then judgment should be for appellant on the ground that he voted involuntarily and that his case comes within this court's ruling in *Takehara v. Dulles,* 205 F. 2d 560.

I.

Appellee Did Not Meet the Burden Required of Him in Order to Take Away Appellant's United States Citizenship.

A. Preliminary Statement As to the Law of Expatriation, Generally.

This court has expressed itself, on a number of occasions on the general question of expatriation from United States citizenship. (See, *e. g., Acheson v. Murakami,* 176 F. 2d 953; *McGrath v. Abo,* 186 F. 2d 766; *Fukumoto v. Dulles,* 216 F. 2d 553; *Kawakita v. United States,* 190 F. 2d 506, aff'd 343 U. S. 717; *Takehara v. Dulles,* 205 F. 2d 560; *Attorney General v. Ricketts,* 165 F. 2d 193.) From these and other cases these principles emerge: there can be no expatriation unless there is a voluntary renunciation or abandonment of nationality; citizenship is a precious right that cannot be lightly taken away; ambiguous or equivocal conduct is not sufficient to cause loss of citizenship; United States citizenship is not to be taken away or deemed forfeited except in the clearest cases, the evidence in this regard must be clear, unequivocal and convincing, and not by a mere preponderance which leaves the case in doubt. (*Cf., Perkins v. Elg,* 307 U. S. 325; *Dos Reis, ex rel. Camara v. Nicolls,* 161 F. 2d 860 (C. C. A. 1, 1947); *Podea v. Acheson,* 179 F. 2d 306 (C. A. 2d, 1950); *Schneiderman v. United States,* 320 U. S. 118, 125; *Baumgartner v. United States,* 332 U. S. 665, 670; *Mandoli v.*

Acheson, 344 U. S. 133, 193; *Acheson v. Maenza,* 202 F. 2d 453 (C. A. D. C., 1954); *Monaco v. Dulles,* 210 F. 2d 769 (C. A., 1954.)[4]

Accordingly, we turn to the law and facts applicable to this case.

B. Appellant's Service in the Japanese Army Was Involuntary.

In *Lehmann v. Acheson,* 206 F. 2d 592 (1953), 214 F. 2d 403 (1954), and *Perri v. Dulles,* 206 F. 2d 506 (1953), the Court of Appeals for the Third Circuit has done much to clarify the law. Understanding the nature of the problem (just as this Court did as to the Tule Lake situation in *McGrath v. Abo,* 186 F. 2d 766), the court said (206 F. 2d at 594) that:

> "Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish *prima facie* that his entry and service were involuntary . . .
>
> "Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in

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[4]These concepts are especially important in view of the doubtful constitutionality of the statute altogether. (*Cf., United States v. Wong Kim Ark,* 169 U. S. 649, 703; *Dos Reis v. Nicolls,* 161 F. 2d 860; *Okimura v. Acheson,* 90 Fed. Supp. 587, 111 Fed. Supp. 303; *Murata v. Acheson,* 99 Fed. Supp. 591, 111 Fed. Supp. 306; *Terada v. Dulles,* 121 Fed. Supp. 6.) This whole question was briefed in *Hamamoto v. Acheson,* No. 13136, and *Dulles v. Furusho,* No. 13093 in this Court, both appeals dismissed by agreement of the parties, the first, because appellant restored his citizenship through the procedure of former 8 U. S. C. 717(c); the second, because even if the Government obtained a reversal, appellee would be entitled to the benefit of the Watkins Act.

the Swiss Army as a result of his conscription were involuntary."

The cases are of double importance because they reversed trial courts which had found for the government factually on the duress issue.

Accord:

Grensheimer v. Dulles, 117 Fed. Supp. 836 (D. C. D. N. J., 1954).

Furthermore, the court in *Lehmann* recognized, as did the court in *Okimura* and *Murata, supra,* footnote 4, that one does not lose his citizenship by complying with the laws of another state of which he also has nationality. Said the court (206 F. 2d at 597 and 598):

> ". . . As was stated in *Tomaya* (*sic*) *Kawakita v. United States, supra,* 343 U. S. at pages 723, 725, 72 S. Ct. at page 956, 96 L. Ed. 1249, 'The Concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries *and be subject to the responsibilities of both,*' and 'As we have said, dual citizenship presupposes rights of citizenship in each country. *It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the* maintenance of the other.'" (Emphasis supplied.)
>
> "Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which would possibly justify a finding that Lehmann did aught but

> what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland . . ."

This concept in different language had previously been concurred in by the Attorney General in his opinion (41 Ops. Atty. Genl. No. 16), quoted from and approved by the Supreme Court in *Mandoli v. Acheson,* 344 U. S. 133, 135. In another part of this opinion, the Attorney General said:

> ". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation . . ."

The court in *Lehmann* also went on to say (206 F. 2d at 598):

> ". . . (A)s we earlier stated conscription into a foreign army of one holding dual citizenship is sufficient to establish *prima facie* that the entry into and the service in that Army were involuntary. As already noted the Government failed in its obligation to rebut that presumption. Additionally, it may be noted that it has long been established that the burden of proving expatriation generally is upon the defendant who affirmatively alleges it and the burden is a 'heavy' one. *Bauer v. Clark* (7 Cir., 1947), 161 F. 2d 397, certiorari denied 332 U. S. 839, 68 S. Ct. 210, 92 L. Ed. 411, rehearing denied 332 U. S. 849, 68 S. Ct. 342, 92 L. Ed. 419. The Government has completely failed in this respect."

Noting the anomalous position of the Government in the *Lehmann* case as compared with its concession in the

Mandoli case (344 U. S. 133),[5] the court said (206 F. 2d 599):

> "We can see no valid reason for making any distinction between service by conscription in the Italian Army and service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress sanctions in the event of non-compliance."

In *Adams v. Maryland,* 347 U. S. 179, the United States Supreme Court affirmed, in effect, what the Court of Appeals had said in the *Lehmann* and *Perri* cases. In the *Adams* case the Supreme Court recognized that one who appeared before a Senate investigating committee by virtue of having been subpoenaed did not act voluntarily. The court said (347 U. S. at 181):

> ". . . He was not a volunteer. He was summoned. Had he not appeared he could have been fined and sent to jail."

In *Murata v. Dulles,* 111 Fed. Supp. 306, 308 (D. C. D. Haw., 1953), the court said:

> "As a citizen of Japan, living in Japan, the plaintiff was subject to Japanese law and under compulsion to comply with Japanese law. His compliance with the conscription law of Japan did not result in a loss of United States citizenship."

Accord:

> *Okimura v. Dulles,* 111 Fed. Supp. 303, 306 (D. C. D. Haw, 1953).

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[5]With which the Supreme Court agreed: "The choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all." (344 U. S. at 135.)

The application of these principles to the instant case when viewed against the background of wartime, totalitarian, militaristic, tyrannical Japan, would seem manifest.[6] And courts which have considered the matter in similar cases have so recognized.

In *Kanno v. Acheson,* 92 Fed. Supp. 183 (D. C. S. D. Cal. 1950), the court said:

> "For some years prior to Pearl Harbor and until the surrender of Japan in 1945, Japan and its people were under the control of the military authorities of Japan, and the Secret or Thought Police, and the Special Higher Police; and during that period the people of Japan were generally in fear of them and particularly in fear of physical punishment, from the

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[6]We attach as an Appendix "B," comments and extracts from official and other authoritative accounts of the nature of Japan at the time here involved. These and other documents were before the trial court and are here before this Court. (See Stipulation *re* Exhibits Admitted by Reference.) As to those documents not admitted into evidence, but marked for identification, this Court can take judicial notice of the contents showing the conditions and recent history of Japan, as could the trial court. (*NLRB v. E. C. Atkins Co.,* 331 U. S. 398, 406; *Standard Oil Co. v. Johnson,* 316 U. S. 481, 483, 484; *Tempel v. United States,* 248 U. S. 121, 126; *Stainback v.. Mo Hock Ke Lok Po,* 336 U. S. 368, 375; page 11 of brief for Government in *Hirabayashi v. United States,* 320 U. S. 81; *Maritime Union v. Herzog,* 78 Fed. Supp. 146 (D. C. D. C. 1948), aff'd 334 U. S. 854:

> "We judicially know the facts of current history and cannot close our eyes to them and to their significance."

United States v. Kusche, 56 Fed. Supp. 201, 206 (D. C. S. D. Cal. 1944):

> "A proposition which is common knowledge, and of which the court can take judicial notice, viz., that when Hitler came to power in 1933 he suspended the personal liberty provisions of that Constitution and thereupon and thereafter he established an absolute dictatorship based upon the tenets of national socialism."

Other cases in accord are: *Ex parte Milligan,* 4 Wall. (U. S.) 2, 18 L. Ed. 281, 296; (that the federal authority in Indiana was

Japanese military authorities, the Secret Police and the Special Higher Police."

In *Kato v. Acheson,* 94 Fed. Supp. 415, 416 (D. C. S. D. Cal., 1950), it was said:

". . . the plaintiff, and other young American-born Japanese, before the war was on and thereafter, found themselves in an atmosphere in Japan of being dominated by a cruel and unjust military government although they had only gone to Japan to receive an education, and their desire and intention was to return to the United States, but were refused a passport. Their situation there is clearly reported as to such circumstances in the official report of General MacArthur to the United States after an investigation. He, after making an investigation, found that the military forces of Japan prior to and until Japan surrendered, ruthlessly and brutally dominated Japan

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always unopposed); *The Appollon,* 9 Wheat. (U. S.), 362, 374, 6 L. Ed. 111, 114 (that smugglers infested that particular area); *Ponce v. Roman Catholic Church,* 210 U. S. 296, 309 (of the history of Porto Rico and its legal and political institutions up to the time of its annexation by the United States); *DeWitt v. Wilcox,* 161 F. 2d 785, 787 (C. C. A. 9, 1947), cert. den. 332 U. S. 763 (military problems facing General DeWitt during the war); *Ex parte Zimmerman,* 132 F. 2d 442, 445 (C. C. A. 9, 1952), cert. den. 319 U. S. 744) (that the Hawaiian Islands and the Pacific area of the United States were faced with an imminent threat of invasion at the beginning of the war); *Hunter v. Wade,* 169 F. 2d 973, 976 (C. A. 10, 1948), aff'd 336 U. S. 634, reh. den. 337 U. S. 921) (that during the war in Europe the United States armed forces were moving rapidly and conditions in the field were fluid); *In re Bush,* 84 Fed. Supp. 873 (D. C. D. C., 1949) (that on the surrender of Japan the American armed forces occupied Japan); *Gualtieri v. Sperry Gyroscope Co., Inc.,* 67 Fed. Supp. 219, 221 (D. C. E. D. N. Y., 1946) (of industrial condition which existed in the nation during the period immediately before the war and during the war); *Tidmore v. Mills,* 32 So. 2d 769, 777 (Court App. Ala., cert. den. 32 So. 2d 782); *Atchison, T. & S. F. R. Co. v. United States,* 284 U. S. 248, 260; *Skendzel v. Rose Manor Realty Co.,* 80 Fed. Supp. 619, 622 (D. C. E. D. Wisc., 1948); *The Pietra Campanella,* 73 Fed. Supp. 18, 27 (D. C. D. Md., 1947).

regardless of the rights of all, and it is easy to ascertain the dominating atmosphere and situation this plaintiff and others were in which the military forces of Japan arbitrarily dominated."

In *Morizumi v. Atcheson,* 101 Fed. Supp. 976, 977 (D. C. N. D. Cal., 1951):

"It is clear that at the time petitioner was ordered to report for army duty in 1945, he had no reasonable choice but do so. Nor would it be reasonable to expect him to have protested, however abhorrent such service was to him. It would have required unusual courage and intense devotion to principle for anyone in petitioner's position to have protested. In view of the domination of the military over Japanese life, the gesture would undoubtedly have been futile. For petitioner to have asserted his United States citizenship as the basis for his refusal to serve, at a time when our bombing was reducing Japanese cities to rubble, would surely have resulted in the most serious consequences. In view of what is generally known of conditions in Japan, it is not likely that he would have escaped with merely a prison sentence."[7]

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[7]*Cf.*, as to a similar situation in Italy, this admission by the Attorney General (41 Ops. Atty. Genl. No. 16), quoted and adopted by the Supreme Court in *Mandoli v. Acheson,* 344 U. S. 133, 135:

". . . 'The choice of taking the oath or violating the law was for a soldier in the Army of Fascist Italy no choice at all' . . ."

Accord: *Acheson v. Macnza,* 202 F. 2d 453, 459 (C. A. D. C., 1953):

". . . That testimony must be considered in connection with the well-known ruthlessness of the Fascist regime which, even as early as 1935, would hardly have tolerated resistance to its draft laws by an admitted national of Italy. Surely, the outbreak of the war, with its attendant wave of emotionalism and chauvinism in Mussolini's Italy, would have rendered further opposition to military service not only futile and unavailing but exceedingly dangerous to the safety and perhaps the life of the person voicing such opposition . . ."

This court only recently, in *Fukumoto v. Dulles,* 216 F. 2d 553, recognized the nature of Japan and the compulsions exercised upon a person such as appellant here. Indeed the *Fukumoto* case is even stronger from the Government's point of view for at least two reasons: (1) The appellant there took positive steps to actually recover and again become a Japanese citizen, an act which, if voluntary and if amounting to naturalization, was expatriating under 8 U. S. C. 801(a); (2) The appellant there was under no compulsion of law.

The trial court in *Fukumoto* held as a fact that the plaintiff there had acted voluntarily. Nevertheless, this court reversed, and said (216 F. 2d at 555):

> "It is apparent the District Court had no proper realization of what motivation drove Fukumoto to apply for Japanese citizenship."

In its discussion this court recalled the situation in this country as explained in its decision in *Acheson v. Murakami,* 176 F. 2d 953, the same set of circumstances which prompted this court to rule in *McGrath v. Abo,* 186 F. 2d 766, 772, that:

> ". . . a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary."

We submit the point to be well taken that the same principles apply here as in denaturalization cases. (*Cf., Schneiderman v. United States,* 320 U. S. 118, 122; *Baumgartner v. United States,* 322 U. S. 665; *Lehmann v. Acheson,* 206 F. 2d 592, 599; *Acheson v. Maenza,* 202 F. 2d 453, 456, *Monaco v. Dulles,* 210 F. 2d 760.) However, as in *Fukumoto,* we believe that question need not be de-

cided. We submit that on the ordinary burden of proof and because of the presumption of involuntariness which the government did not rebut, judgment should have been for appellant.

There is no evidence to support the Government's contention that appellant acted voluntarily. The trial court's view [R. 84-85] that judgment must be for appellee because appellant lied at the Consulate in order to save his citizenship, and therefore he was impeached at the trial court, does not reach the issue here. Without condoning the conduct, it was about an immaterial matter and really of small import, although the court and government counsel blew it up beyond all proportion and out of perspective.

Appellant did not lie as to the acts which might lead to expatriation, military service and voting. He lied as to having voted in 1947 and 1948 [R. 51].[8] But he did not deny and frankly told the consulate that he had served in the Army [Exs. A, C, D], and that he had voted in 1946 [R. 51, 54, 56].

The misstatement by appellant at the Consulate does not erase from the case the other facts (compulsory drafting, the nature of Japan, etc.), about which there is no dispute, and which bring this case clearly within the cases discussed above.

---

[8]There is some suggestion in the record [R. 83] that appellant told an "American soldier" that he had not been a member of the Kempei-tei. But of what materiality is that? He did not so lie before the Consulate nor did he present any document to the Consulate falsifying his military service.

There have been other cases where the plaintiff has lied even about the ultimate act which is expatriating under the statute, a matter of much greater consequence than here where appellant falsified not that he had not voted, but as to the number of times he had voted. But the courts have recognized the fears and pressures which a person such as appellant here undergoes at the trying time before the Consulate in his effort to return to the United States. (See, *e. g., Serizawa v. Acheson,* No. 30448 (U. S. D. C. N. D. Cal., 1953), unreported):

> "The fact that plaintiff falsely represented, in a written statement filed with the American Cunsul at Yakohama, that he had not voted in a Japanese election does not necessarily destroy his crediibility otherwise. In the light of plaintiff's testimony that he learned after he had voted that the State Department might not allow him to return to the United States because of such action on his part, it is reasonable to conclude that his fear of being prevented from returning to the United States would motivate him to hide the fact rather than to try to explain it."

Accord:

> *Yamasaki v. Dulles,* No. 1244 (U. S. D. C. D. Haw., 1953, unreported):

> "The defendant sought to impeach plaintiff's testimony as to his reasons for voting in the 1946 election on the basis of the false statements admittedly made by plaintiff to the Vice Consul and the election official. The fact that plaintiff made such false representations under the circumstances does not necessarily destroy his credibility otherwise. It is not unreasonable to conclude that his fear of being prevented from returning to the United States would

motivate him to hide the fact he had voted rather than try to explain it."[9]

To the same effect are:

Murata v. Acheson, 111 Fed. Supp. 306, 307 (D. C. Haw., 1953);

Hisamoto v. Dulles, No. 1318 (D. C. Haw., 1954).[10]

Moreover, appellant's misstatement as to the number of times he had voted bear, if at all, no election issue, not on the military service issue.

Furthermore, appellant's purported misstatement to the soldier (the record does not make clear what he said), as to what he had done in the army is immaterial. His entrance into the army was involuntary. Subsequent conduct could not make it voluntary.

Pandolfo v. Acheson, 202 F. 2d 38, 41 (C. A. 2, 1953).

* * * * * * * * *

---

[9]*Cf.,* the testimony of appellant at the trial [R. 59]:

"I was afraid that if I would mention all the times that I voted, that I would lose my American citizenship and wouldn't be able to receive my passport, and that was the chief reason of not receiving my papers, I was afraid of that, and at that time I was so anxious to return to the United States."

[R. 83]:

"Q. Will you please tell us and tell the Court, if you can remember, why you told the American soldier that you were not a member of the Kempei tai? A. I was afraid if I admitted I was a Kempei tai, I wouldn't be able to return to the United States."

[10]And *cf., Martinez v. McGrath,* 108 Fed. Supp. 155 (U. S. D. C. D. Tex., 1952), where the plaintiff, in trying to please the consular officer said that he had voted, when actually he had not. The Court, recognizing the realities of the situation, declared plaintiff to be a citizen.

From the cases and principles discussed above the District Court's holding that appellant's service in the Army was voluntary was clearly erroneous and should be reversed. (*Cf.,* this court in *Acheson v. Murakami,* 176 F. 2d 953, 959.)

II.
The Election Issue.

We believe that the only proper ruling for this Court to make on the army issue is to reverse the trial court as was done in the *Lehmann* case and hold that appellant did not lose his United States nationality by reason of his army service. If we are wrong on this, then the election issue need not be reached at all. If we are right, then the following are our views on the election phase of the case.

The instant case comes within this court's ruling in *Takehara v. Dulles,* 205 F. 2d 560, and appellant is entitled to a reversal on the basis thereof.

We do not brief the matter more fully, however, because we suggest to the court that this issue need not be reached at this time.

Subsequent to the entry of judgment herein, Congress passed Public Law 515, 83d Congress, popularly known as the "Watkins Act." A copy of the Act is set out here as Appendix "C." Congress thus recognized the involuntary nature of the voting by Nisei such as appellant here in the elections in occupied Japan, and provided a simple

method for them to regain their citizenship, namely, the taking of an oath of allegiance.

Recognizing the wisdom of affording such persons the opportunity to obtain the benefits of the statute, this court has entered orders in at least three cases pending on appeal before it, holding in abeyance further processing of appeals until the procedures of the statute have been completed.

See:

Hori v. Dulles, No. 14458;
Owada v. Dulles, No. 14411;
Sakamoto v. Dulles, No. 14456.[11]

Accordingly, appellant suggests the following alternatives as the proper method for disposition of the election issue:

1. The court rule that the case falls within *Takehara* and that therefore appellant's voting was involuntary;

2. If the court does not agree, or feels it proper not to consider the matter at this time, the case be sent back to the District Court to permit appellant to take the oath provided in the Watkins Act. This was the procedure that the Court of Appeals for the Third Circuit adopted in *Perri v. Dulles,* 206 F. 2d 586, in connection with similar legislation in regard to voting in Italian elections. We do not believe that appellee would oppose this procedure.

---

[11]In agreement with counsel on all sides, the trial courts are similarly holding in abeyance trials in election cases until the plaintiffs process their cases under the Watkins Act.

Conclusion.

On the army issue, the case should clearly be reversed. On the election issue, the case should be disposed of by one of the alternatives suggested above.

Respectfully submitted,

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APPENDIX "A."

Japanese Law.

(In evidence by reference to Exhibit 16, Mutsuye v. Dulles, No. 1232 N. D., U. S. D. C., S. D. Cal.)

Constitution of Japan.

Article 20:

"A subject of Japan will obey the laws and have obligations of military service."

Japanese Military Service Law.

Article 1:

"Male subjects of the Empire shall serve in the military service as established in this law."

Age of Conscription.

Originally, the age for the conscription physical examination was 20 years as expressed in Article 23 of the Japanese Military Service Law as follows:

Article 23:

"Any person who becomes 20 years old during the time between December 1 and November 30 of the following year must take the physical examination for conscription, except those to whom special provision of this law is applied. The age stipulated in the foregoing clause is called the conscription age."

The age for the conscription physical examination was lowered to 19 by Imperial Ordinance No. 939 dated December 23, 1943.

The physical examination above referred to was given in the spring of each year. In the case of persons born

before December 2, the physical examination was given in the spring before the 19th or 20th birthday (depending upon the conscription age applicable), and in the case of persons born after December 2, the physical examination was given in the spring following the 19th or 20th birthday.

Evasion of Military Service.

Articles 74 and 75 of the Japanese Military Service Laws are as follows:

Article 74:

> "Any person who evades military service by deserting or hiding, injuring wilfully one's body, or acquiring disease and by other acts of fraud will be punished by penal servitude of three years or less."

Article 75:

> "Persons called for military service who delay entering the barracks for more than ten days, without any legitimate reason, shall be punished by imprisonment of six months or less; during wartime, when five days have elapsed, shall be punished by imprisonment of one year or less."

APPENDIX "B."

Extracts From and/or Comments on Documents Admitted Into Evidence or Marked for Identification, by Reference From Matsuye v. Dulles, No. 1232 N. D., D. C., S. D. Cal. (Exhibit Numbers Are the Numbers Given in the Matsuye Case).

SCAP, Education in the New Japan 6, 16 May, 1948 [Ex. 5 for Ident.]:

"In 1925, the Ministry of Education issued an ordinance that, at the time, caused some dissention, but that came to be accepted as an integral part of the educational program. This ordinance provided that military officers on active duty should be appointed to give military instructions in all government and public normal, middle, higher, technical and special schools. In the next 15 years, further changes designed to sharpen the educational system into an able instrument of nationalistic policy were made. Regimentation and a hierarchal centralization of power over education were intensified in 1937 and 1941. This system continued until August, 1945.

"One significant feature of the middle schools was military training which was integral and important part of the curriculum. Here the Japanese boy was subjected for the first time to fully organized military training. The War Department provided officer instructors and during the war the training occupied five hours a week. Instruction included squad drill, military evolutions, target practice, bayonet fighting, and the use of hand grenades and other implements of warfare. Toward the end of the war there was little opposition to military training in the schools, many middle school graduates being drafted directly from their schools into the army, while a sub-

stantial number of others went to training schools for junior officers.

"For a long time the average citizen's reaction to the police has been one of extreme fear." [SCAP, Summation, No. 3, Dec. 1945; Ex. 4 for Iden.]

"Free thought and free expression have been practically unknown in Japan. The police have occupied a dominant role in the government and have exercised almost complete control over all phases of Japanese life. In addition to the regular police employed in maintaining law and order, Japan had an extensive network of secret police (Kempeitai) and 'thought police.' The former possessed army authority and the latter authority of the Peace Preservation Act of 1941 and similar enactments on 'thought control.' Together they had been given unlimited power to deal with any signs of unrest or dissatisfaction. Thus the emergence (end of p. 36) of democratic groups was subjected immediately to ruthless terrorization and brutality. The press and radio have served as the mouthpiece of government policy." [SCAP, Summation No. 1, Sept., Oct. 1946, pp. 36-37; Ex. 2, for Ident.]

"Free thought and speech were completely suppressed by the special types of Japanese police. Ruthless methods prevented the emergence of authentic democratic groups." (*Ibid.,* 33.)

"The Japanese theatre was in a condition of stagnation. Expression of new ideas was not permitted and plays were either propagandistic or escapist in nature. Troupes touring the Country presented nothing but obviously official materials." (*Ibid.,* 148.)

"In the course of 20 years, Japanese militarists had constructed effective machinery for controlling the speech, thoughts, and movements of the people. This was accomplished through legislation, the police, consorship regulations, centralized control over newsprint and ownership of radio broadcasting facilities." (*Ibid.,* 163.)

"In the later years, preceding and during the war, the most vicious regimentation of the people came through the police force of Japan, which was also under the Home Ministry. By both legal and extra-legal methods the police eliminated dissident elements, frequently throwing people in jail who were considered troublesome and keeping them there for years without lodging specific charges." [SCAP, *Two Years of Occupation,* p. 14; Ex. 10, for Ident.]

"Most objectionable of these were, of course, the supervision and restriction of the people in the exercise of their fundamental rights under the so-called Peace Preservation Law. For this purpose there were 'Thought Police' or 'Special Higher Police' units in the municipalities, prefectures and in the Home Ministry. The activities of these bodies were supplemented by the 'Protection and Surveillance Commission' and 'Protection and Surveillance Stations' in the procuratorial system under the Ministry of Justice." [SCAP, *A Brief Progress Report on the Political Reorientation of Japan,* p. 7; Ex. 10, for Ident.]

"The great masses of the people, docile by training and terrorized by fear, were without a voice in the determination of their own affairs." [SCAP, *Two Years of Occupation,* pp. 13-15; Ex. 10, for Ident.]

"(Nisei, whether in Japan a long or short time) were under surveillance (by the police) by reason of their identity and association." [Togosaki Deposition, p. 10; Ex. 13 in Evidence.]

"Conscription or government notification is final to which no one can appeal. There is no process, no media, no channel by which an appeal can be made." (*Ibid.*, p. 26.)

"There was fear . . . among (the draftees) that . . . they would be shot or killed . . . if they didn't obey summons." (*Ibid.*, p. 27.)

The Murayama Deposition was also admitted into evidence [Ex. 14]. This court commented on several features from it in *Fukumoto v. Dulles,* 216 F. 2d at 555.

After the Manchurian incident, no one refused military conscription. [Matsuki Deposition, pp. 15, 17; Ex. 15 in Evidence.] One couldn't refuse conscription. (*Ibid.*, pp. 18, 21.)

APPENDIX "C."

Public Law 515, 83rd Congress, Chapter 553, S. 1303, 66 Stat. 240.

An Act.

To provide for the expeditious naturalization of former citizens of the United States who have lost United States citizenship by voting in a political election or plebiscite held in occupied Japan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a person who has lost United States citizenship solely by reason of having voted in any political election or plebiscite held in Japan between September 2, 1945, and April 27, 1952, inclusive, and who has not, subsequent to such voting, committed any act which, had he remained a citizen, would have operated to expatriate him, and is not otherwise disqualified from becoming a citizen by reason of sections 313 or 314, or the third sentence of section 318 of the Immigration and Nationality Act, may be naturalized by taking, prior to two years after the date of the enactment of this Act, before any naturalization court specified in subsection (a) of section 310 of the Immigration and Nationality Act or before any diplomatic or consular officer of the United States abroad, the applicable oath prescribed by section 337 of such Act. Certified copies of such oath shall be sent by such court or such diplomatic or consular officer to the Department of State and to the Department of Justice. Such oath of allegiance shall be entered in the records of the appropriate naturalization court, embassy, legation, or consluate, and upon demand, a certified copy of the proceedings, including a copy of the oath administered, under the seal of the natur-

alization court, embassy, legation, or consulate, shall be delivered to such person at a cost not exceeding $5, which certified copy shall be evidence of the facts stated therein before any court of record or judicial tribunal and in any department or agency of the Government of the United States. Any such person shall have, from and after naturalization under this Act, the same citizenship status as that which existed immediately prior to its loss: Provided, That no such person shall be eligible to take the oath prescribed by section 337 of the Immigration and Nationality Act, unless he shall first take an oath before any naturalization court specified in subsection (a) of section 310 of the Immigration and Nationality Act, or before any diplomatic or consular officer of the United States abroad, that he has done nothing to promote the cause of communism. Naturalization procured under this Act shall be subject to revocation as provided in section 340 of the Immigration and Nationality Act, and subsection (f) of that section shall apply to any person claiming United States citizenship through the naturalization of an individual under this Act.

Approved July 20, 1954.

No. 14457.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES,

Appellee.

On Appeal From the United States District Court, Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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IN THE

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TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES,

Appellee.

On Appeal From the United States District Court, Southern District of California, Central Division.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court has jurisdiction of the action under provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) as alleged in Paragraph III of plaintiff's Complaint [R. 3], the necessary factual allegations of "denial of a right or privilege as a national of the United States * * * on the ground that he is not a national * * *" as required by Section 903 being alleged in Paragraphs V and VI of plaintiff's Complaint [R. 4]. The denial having been made by the Secretary of State, the defendant, as head of that Department, is the necessary and proper defendant as required by said Section 903, *supra*.

This Court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1291 and 1294(1), there being no dispute that the judgment of the District Court was a final judgment.

Statutes Involved.

The denial of citizenship by defendant-appellee was based on the provisions of Sections 401(c), 401(e) and 402 of the Nationality Act of 1940 (8 U. S. C. 801(c), 801(e) and 802) as follows:

> "§801. General means of losing United States Nationality.
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; . . .
>
> §802. Presumption of expatriation.
>
> A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a

diplomatic or consular officer of the United States or to an immigration officer of the United States under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. * * *"

Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) is set forth in part as follows:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Statement of the Case.

Appellant was born in Hawaii on September 5, 1924 [R. 22] and thus had dual nationality of the United States and Japan by birth [R. 12]. His parents, two brothers and two sisters travelled to Japan in 1933 when the appellant was eight years old [R. 23]. Appellant remained in Japan except for a period of army service in Korea and China until August 3, 1953, when he was admitted to the United States on a Certificate of Identity to prosecute this action.

In October, 1941, appellant became employed at the Naval Arsenal, Hiroshima, Japan, making airplane parts and continued working there until December, 1944 [R.

13, 39-40]. Appellant then entered the Japanese Army where he served until 1946 [R. 32-33]. While in the army, appellant was trained for and became, a member of the Kempetai [R. 44]. The Kempetai was an organization within the Japanese army which was the military or secret police. It was considered a high honor for a soldier to obtain membership in such an elite segment of the army [R. 41, 44-47]. After the war, appellant voted in political elections in Japan of 1946, 1947 and 1948 [R. 33].

In 1949, appellant applied at the American Consulate in Japan for a passport to return to the United States [R. 35]. The passport application was denied and a "Certificate of the Loss of the Nationality of the United States" was issued appellant which recited that he had expatriated himself by serving in the Japanese army as a Japanese national.

The Complaint in the action was filed by appellant on October 18, 1949, praying for a declaration of United States nationality [R. 3-6]. Trial was had on March 19, 1954, with judgment being rendered for appellee and against appellant [R. 11]. Findings of Fact and Conclusions of Law were signed and filed by the District Court on April 19, 1954 [R. 11-17]. Judgment was docketed and entered also on April 19, 1954, and Notice of Appeal filed June 18, 1954 [R. 17-19].

During the trial, only the plaintiff testified as is the usual situation in cases of this type. He testified in general that he had been drafted into the Japanese army pursuant to the conscription law and that he had not protested on the ground that he was an American citizen because he was afraid. Appellant further testified that he had only voted because he was afraid of losing his rations

and because it was an order to vote from General McArthur's headquarters. He therefore claimed that both his army service and voting had been involuntary.

On cross-examination the appellant admitted making several prior statements which were in conflict with his testimony at the trial [R. 52-65]. The statements contained in Exhibit D which were admittedly written by appellant show a loyalty to Japan and a desire to aid Japan's war effort [R. 59, 60].

The Findings of Fact filed by the Court recite that the appellant's army service and voting were his free and voluntary acts [R. 14, 15.] The Findings also recite that appellant did not protest either his entry into the Japanese army or the Kempetai and that appellant made misstatements under oath [R. 13, 14].

Questions Presented.

1. Which party has the burden of proof, appellant or appellee, and the quantum of proof necessary for that party to prevail.
2. Whether the finding that appellant's military service was voluntary was clearly erroneous.
3. Whether this Court should decide the voting issue or remand the case as was done in *Perri v. Dulles* (C. A. 3, 1953), 206 F. 2d 586, in the event it is determined that the finding that appellant's military service was voluntary was clearly erroneous.
4. If the Court feels it should decide the voting issue, whether the finding that such voting was voluntary was clearly erroneous.
5. Whether Exhibits "A", "C", and "D" were properly admitted in evidence.

ARGUMENT.

Summary of Argument.

A. UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940 (8 U. S. C. A., SEC. 903), THE BURDEN OF PROOF IS UPON PLAINTIFF.

1. No presumption of involuntariness arises merely because of conscription into army.

2. Plaintiff must establish by preponderance of evidence that the expatriating act was not voluntary.

B. THE FINDING OF THE TRIAL COURT THAT APPELLANT'S ARMY SERVICE WAS VOLUNTARY IS SUPPORTED BY THE EVIDENCE.

C. THE VOTING ISSUE HAS PRACTICALLY BECOME MOOT DUE TO THE ENACTMENT OF THE "WATKINS ACT", PUBLIC LAW 515, 83rd CONGRESS.

1. If this Court rules upon the voting issue notwithstanding the Watkins Act, the finding of the trial court that the voting was voluntary is supported by the evidence.

D. EXHIBITS "A", "C" and "D" WERE PROPERLY ADMITTED INTO EVIDENCE.

A. Under Section 503 of the Nationality Act of 1940 (8 U. S. C. A., Sec. 903), the Burden of Proof Is Upon Plaintiff.

Appellant filed his action alleging that he had been born in Hawaii and had later travelled to Japan, served in the Japanese army and voted in Japanese elections. It was also alleged that his military service and voting had not been his free and voluntary acts [R. 4, 5]. The answer filed by appellee admitted that appellant had served in the Japanese army and had voted in 1946 and affirmatively alleged that appellant had also voted in 1947 and 1948 [R. 7]. The answer denied appellant's allegations that his military service and voting had not been voluntary [R. 8]. There was no direct finding by the trial court that appellant had been conscripted although finding "X" recites that "Plaintiff did not protest his induction into the army and did not protest his service in the Kempetai . . ." [R. 13, 14].

Under Section 503 of the Nationality Act of 1940, the burden of proof is upon the plaintiff in general. (*Shew v. Dulles* (C. A. 9, 1954), 217 F. 2d 146; *Pandolfo v. Acheson* (C. A. 2, 1953), 202 F. 2d 38; *McGrath v. Tadayasu Abo* (C. A. 9, 1951), 186 F. 2d 766.)

1. No Presumption of Involuntariness Arises Merely Because of Conscription Into Army.

Appellant contends that a presumption of involuntary service arises where one enters the armed forces of a nation pursuant to a conscription law. Appellee submits there is a presumption of voluntary service under the statute which must be overcome by a plaintiff in an action under Section 503 of the Nationality Act. The case of *Pandolfo v. Acheson* (C. A. 2, 1953), 202 F. 2d 38,

states that the burden is first upon the plaintiff to establish his birth in the United States. The burden of going forward is then shifted to the government to show an expatriating act and finally, the burden of showing, by the preponderance of evidence, that such act was involuntary, is upon the plaintiff. Therefore, in a case such as at bar, where the complaint alleged military service and further, that such service was involuntary, it would seem to be clear that the burden is upon plaintiff to establish such fact. (*In re Gogal* (1947), 75 Fed. Supp. 268; *cf. Lehmann v. Acheson* (C. A. 3, 1953), 206 F. 2d 592.)

In the case of *Hamamoto v. Acheson* (1951), 98 Fed. Supp. 904, 905, Judge Byrne stated in reply to a contention by the plaintiff that service pursuant to a conscription law could not be voluntary as follows:

> "To accept that reasoning is to defeat the Congressional design to discourage dual nationality which is implicit in the statute. Can we believe that Congress intended the Act to be ineffective with relation to foreign states that followed a policy of conscription in the recruitment of their armies? Can we say that the hundreds of thousands of United States servicemen who were conscripted and served during the last war were involuntarily forced into the service under duress? On the contrary, when they answered the call to arms without resistance their action was voluntary and this included those who did not view the prospect of army life with relish as well as those imbued with the zeal of patriotism."

To similar effect see the case of *Toshio Kondo v. Acheson* (1951), 98 Fed. Supp. 884.

2. Plaintiff Must Establish by the Preponderance of Evidence That the Expatriating Act Was Not Voluntary.

The presumption contained in the statute (Sec. 503 of the Nationality Act, 8 U. S. C. A., Sec. 802, *supra*), would seem to clearly place the burden of proof upon the plaintiff since he resided in Japan approximately twenty years. The appellant's expatriating act involved military service and therefore is included within the language ". . . shall be presumed to have expatriated himself under subsection (c) or (d) of Section 801 . . ." It is submitted that the following cases cited above also place the burden of proof upon the plaintiff.

Pandolfo v. Acheson (C. A. 2, 1953), 202 F. 2d 38;

McGrath v. Abo (C. A. 9, 1951), 186 F. 2d 766;

Hamamoto v. Acheson (1951), 98 Fed. Supp. 904;

Kondo v. Acheson (1951), 98 Fed. Supp. 884;

In re Gogal (1947), 75 Fed. Supp. 268.

Section 402 of the Nationality Act of 1940 was discussed in the case of *Dos Reis v. Nicolls* (C. A. 1, 1947), 161 F. 2d 860, 868. In that case, it was stated at page 868:

> "* * * Section 402 creates only a rebuttable presumption, and it does not enlarge the content of §401(c). Furthermore, the language of §402—'shall be presumed to have expatriated himself under subsection (c) or (d) of section 401'— furnishes strong support for our interpretation of §401(c). To 'expatriate' oneself clearly implies voluntary action. 'Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." Perkins v. Elg, 1939, 307 U. S. 325, 334, 59 S. Ct. 884, 889,

> 83 L. Ed. 1320. In this case Camara certainly overcame any presumption that he had voluntarily renounced or abandoned his American nationality and allegiance."

The above quoted language was cited with approval in *Kawakita v. United States* (1952), 343 U. S. 717, 730. The fact that the court in the *Dos Reis* case stated that "Camara certainly overcame any presumption" indicates that a presumption arose and that it was for the plaintiff, Camara, to overcome.

The case of *Lehmann v. Acheson* (C. A. 3, 1953), 206 F. 2d 592, relied upon by appellant does clearly state that the burden is upon the defendant to show that army service was voluntary. However, in a footnote to cite authority for their conclusion, reference is made to the interpretation placed upon Section 402 in *Kawakita, supra.* Since *Kawakita* apparently adopted the interpretation as contained in the *Dos Reis* case, *supra,* it is submitted that the rule should properly be that the burden of showing involuntariness is upon plaintiff-appellant.

B. The Finding of the Trial Court That Appellant's Army Service Was Voluntary Is Supported by the Evidence.

The appellant was the only person who testified at the trial as is usual in this type of case. He testified that he had involuntarily entered the Japanese army in 1944 pursuant to a conscription law. On cross-examination he admitted various misstatements to American officials on different occasions while he was in Japan [R. 52-65]. He also admitted that he had been a member of the Kempetai which was the military police organization which "was in charge of the affairs in Japan" [R. 41-44].

Exhibit "A" was admitted to be in the appellant's own hand and signed by him [R. 52]. He stated therein and

had written under oath that he had not voted in the elections in Japan in 1947, 1948 and 1949. On direct examination at the trial he admitted voting in 1946, 1947 and 1948 [R. 33].

Exhibit "D" was also admitted to be written and signed by the appellant [R. 57]. In this document appellant had stated that he voluntarily took an examination to enter the Kempetai and passed and that he had previously made false reports to the American Consul [R. 58]. This document, written by appellant, also contains the statement [R. 59]:

> "The reasons for my entry into the Kempetai was to render greater service to Japan's war effort and at the same time keep in line others who were carrying out their duties."

Exhibit "D" also contains a statement that appellant made a daily oath that " 'I will do my best for the Emperor and endeavor Japan to crush the United States.' I repeated this oath voluntarily and with pride" [R. 61].

The trial judge did not believe the testimony of the appellant. He was certainly justified in refusing to believe the testimony as the appellant admitted lying on previous occasions. The Findings of Fact recite that the appellant's army service had been voluntary [R. 14]. Even if appellant's testimony had been uncontradicted, the District Court was not required to accept it as true. (*Shew v. Dulles* (C. A. 9, 1954), 217 F. 2d 146, 147.) Since the appellant had made prior statements contradictory to his testimony at the trial, there existed strong ground to disbelieve him. The finding of voluntary army service was not erroneous at all, much less, "clearly erroneous," as required by Rule 52(a) of the Federal Rules of Civil Procedure to justify reversal.

C. The Voting Issue Has Practically Become Moot Due to the Enactment of the "Watkins Act," Public Law 515, 83rd Congress.

The appellant admits in his Opening Brief, page 19, that if the judgment of the District Court is affirmed on the army service issue, then the election issue need not be reached. If this court should reverse on the army service issue, however, we believe that the case should then be sent back to the District Court to permit appellant an opportunity to take an oath as provided in the Watkins Act. This is suggested on page 20 of Appellant's Opening Brief under "2". The Watkins Act is set forth as Appendix "C" in the opening brief of appellant.

1. If This Court Rules Upon the Voting Issue Notwithstanding the Watkins Act, the Finding of the Trial Court That the Voting Was Voluntary Is Supported by the Evidence.

It is submitted that this case is not within *Takehara v. Dulles* (C. A. 9, 1953), 205 F. 2d 560, because there apparently was no finding in that case that the voting had been voluntary. Here, the trial court specifically found that the voting had been voluntary [R. 15]. Since the credibility of the appellant was impeached at the trial, the court did not have to believe his statements that his voting had been involuntary. (*Shew v. Dulles, supra.*) The finding was not clearly erroneous.

D. Exhibits "A", "C", and "D" Were Properly Admitted in Evidence.

All of the above exhibits were statements executed and written by the appellant. As was explained above, many of the statements were contrary to his testimony at the trial. They could then be admitted either to impeach the witness or as prior admissions. As admissions, the exhibits would be substantive evidence introduced by the defendant. If they were used only to impeach, then if the witness admitted the prior inconsistent statement they would be hearsay. Judge Byrne had the rule in mind and explained it carefully to counsel during the trial [R. 66]. However, where there was a question raised later as to whether the statements had been voluntarily executed, they were admitted in evidence. When the question of duress in executing the statements was raised, the appellant, in effect, denied making the statements. When he denies making a prior inconsistent statement which was written, but admits that the statement was signed by him, it can be introduced to impeach credibility.

It is therefore submitted that the exhibits were admissible on two grounds: for impeachment and as admissions.

If we assume that the exhibits were not admissions and could only be introduced to impeach the appellant, then their introduction still was not reversible error. To be error at all the appellant would have to admit that he had previously made the inconsistent statement. In that event, the introduction of the document would only be cumulative

and would not be further proof of any fact. The appellant is not prejudiced and therefore it would not be reversible error.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court that appellant was expatriated by reason of entry and service in the army of Japan pursuant to the provisions of Section 401(c) of the Nationality Act of 1940 should be affirmed.

Respectfully submitted,

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No. 14457

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TAKESHI TAMADA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellant will reply to appellee's arguments in the order discussed by him.

A.

The Question of the Burden of Proof (Reply to Appellee's Br. 7).

Appellee's argument as to the burden of proof under Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) does not reach the issue in this case. Under that section, all that need be shown is (1) that plaintiff claimed a right or privilege as a national of the United States; (2) that he was denied such right or privilege (3) by a Department, agency or executive official thereof (4)

upon the ground that he is not a national of the United States. Having done that, he has established his right to a judicial determination as to whether he is a national of the United States.

Appellee concedes that plaintiff proved all the above mentioned elements (Appellee's Br. 3, 4). Accordingly, there is no question in this case as to plaintiff's right to a judicial declaration.

The matter of burden of proof revolves around the question as to who has the burden of proving expatriation, the Government or the person who admittedly was born a citizen and as to whom the Government claims he lost that status.

As to this issue, appellee ignores the clear holdings in the cases cited by appellant (Op. Br. 7, 8) and he ignores the many Circuit Court cases under the specific statute here (8 U. S. C. 801(c)) which have held that the burden of proof is on the Government.[1] It must be remembered that this is not a case of a citizen taking steps *to* expatriate himself (*cf. McGrath v. Abo,* 186 F. 2d 766, cited by appellee, Br. 7), but is a case of the Government attempting to *impose* expatriation based upon the legal act of a citizen of this country under our laws, who also has the citizenship of another country, not by virtue of his own act, but because the laws of that country also make him a citizen thereof. The case here is of a citizen acting under compulsion of, and pursuant to, the laws

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[1]Appellee cites (Br. 7) *Pandolfo v. Acheson,* 202 F. 2d 38 (C. A. 2, 1953). But that case holds for appellant. Thus the court said (p. 40): "The Government then had the burden of proving that he (plaintiff) had expatriated himself." And *cf.* this case with *Augello v. Dulles,* 220 F. 2d 344, 345 (C. A. 2, 1955) *infra.*

of a country in which he was and whose nationality he possessed at the time.[2]

The Second, Third and Seventh Circuits have unmistakably held that in this type of case the burden is upon the Government.

Lehmann v. Acheson, 206 F. 2d 592, 598 (C. A. 3, 1953):

> "(I)t has long been established that the burden of proving expatriation generally is upon the defendant who affirmatively alleges it and the burden is a 'heavy' one."

Augello v. Dulles, 220 F. 2d 344, 345 (C. A. 2, 1955):

> "(O)n the issue of expatriation the burden of proof was on the defendant."

Schioler v. Secretary of State, 175 F. 2d 402, 403 (C. A. 7, 1949):

> ". . . The burden was therefore upon the Secretary to substantiate . . . this essential fact (expatriation) under 8 U. S. C. 801(a) . . ."

The District of Columbia has likewise so held in *Acheson v. Maenza,* 202 F. 2d 453, 456 (C. A. D. C., 1953):

> ". . . In denaturalization cases, the Government has always been held to a strict degree of proof; it is usually required to prove its case by clear, unequivocal and convincing evidence, not by a bare preponderance which leaves the issue in doubt. . . . We can see no reason for imposing a lighter burden on the Government if it seeks to show the expatria-

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[2]*Cf.* this country's treatment of such persons in regard to our own draft law in *Takeguma v. United States,* 156 F. 2d 439 (C. C. A. 9, 1946).

tion of a native-born citizen. Certainly the annihilation of the right is equally disastrous to the person affected in one case as in the other. . . ."

Cf. Alata v. Dulles, 221 F. 2d 52 (C. A. D. C., 1955).

The Ninth Circuit has not directly passed upon the question, but its pronouncements all point to the same rule. In *Attorney General v. Ricketts,* 165 F. 2d 193, 195 (C. A. 9, 1947), this court would not permit expatriation based upon equivocal conduct. In *Fukumoto v. Dulles,* 216 F. 2d 553 (C. A. 9, 1954), this court did not decide the question because it held that on the ordinary burden of proof plaintiff had shown that his conduct had been involuntary and the court reversed a trial court's finding of fact on this issue.[3]

We submit that the direct holdings by the Second, Third and Seventh Circuits, the rationale of the cases from the District of Columbia and from this circuit, and the holdings and rationale of the cases from the United States Supreme Court (cited at pp. 7 and 8 of App. Op. Br.) compel the rule of law contended for by appellant.

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[3]*Shew v. Dulles,* 217 F. 2d 146 (C. A. 9, 1954), cited by appellee (Br. 7) is inapposite to the case at bar. That case involved a question of the plaintiff proving that he had United States citizenship in the first place. As the cases show, this is a very different case from one where the plaintiff is admittedly born a citizen and the Government seeks to expatriate him.

1.

Service in the Army of a Foreign State by One Holding the Nationality of That State and by Virtue of the Compulsory Conscription Laws of That State Is Prima Facie and Presumptively Involuntary (Reply to Appellee's Br. 7-8).

In support of his position that there is no such presumption, appellee cites (Br. 7, 8) four cases: *Pandolfo v. Acheson,* 202 F. 2d 38 (C. A. 2, 1953); *In re Gogal,* 75 Fed. Supp. 268 (D. C., 1947); *Hamamoto v. Acheson,* 98 Fed. Supp. 904 (D. C., S. D. Cal., 1951); and *Kondo v. Acheson,* 98 Fed. Supp. 884 (D. C., S. D. Cal., 1951).[4] These cases do not assist appellee.

The *Pandolfo* case supports appellant. As the Court of Appeals for the Second Circuit said (202 F. 2d at 41):

> ". . . The trial court found that the plaintiff acted under duress as he testified and as may reasonably be believed under the circumstances, since Italy regarded him as an Italian citizen, subject to military service. . . ."

Moreover, the same court in its latest case clearly concurred with the *Lehmann* decision (*supra,* f.n. 4) that military service due to conscription is *prima facie* involuntary. Thus, in *Augello v. Dulles,* 220 F. 2d 344, 347 (C. A. 2, 1955), the court said:

> ". . . the fact of the plaintiff's conscription into the Italian army was sufficient proof of duress to

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[4]Appellee also mentions *Lehmann v. Acheson,* 206 F. 2d 592 (C. A. 3, 1953), which unquestionably supports appellant, but he does not distinguish that case.

preclude a finding that his consequent taking of the oath was voluntary. . . .

". . . since there was no evidence to rebut the inference of duress flowing from the plaintiff's status as a conscript, there is no need to remand for further findings.

"Reversed with a direction to grant the declaration sought."

In re Gogal similarly supports appellant. There the District Court held that plaintiff's military service under conscription was involuntary and that therefore an oath of allegiance to Czechoslovakia taken in connection therewith was likewise involuntary. Moreover, the entire tenor of the case shows a strong understanding by the court of the involuntary nature of military service by conscription. Thus it points out, *inter alia,* that military service "where the avoidance thereof is not within the power of the individual" (75 Fed. Supp. at 271) does not result in loss of citizenship.

Only the *Hamamoto* and *Kondo* cases held for the defendant. However, in the light of the imposing weight of appellate court decisions from several circuits, as well as from the District Courts,[5] we submit that these two cases are scant authority. They were both decided before these appellate cases were decided and were rendered without the benefit of the guidance which those cases afford.

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[5]Some of these are cited in Appellant's Opening Brief (pp. 9-14). Others are *Ishikawa v. Acheson,* 85 Fed. Supp. 1 (D. Haw., 1949); *Shibata v. Acheson,* 86 Fed. Supp. 1 (S. D. Cal., 1949); *Ozasa v. Acheson,* 94 Fed. Supp. 436 (S. D. Cal., 1950); *Terada v. Dulles,* 121 Fed. Supp. 6 (D. Haw., 1954); *Yoshida v. Dulles,* 116 Fed. Supp. 618 (D. Haw., 1954).

Moreover, we believe them to have been erroneously decided.[6]

Appellee does not attempt to distinguish the cases cited by appellant, particularly the obvious implication of the holding of the Supreme Court in *Adams v. Maryland,* 347 U. S. 179, 181. Nor does appellee attempt to explain the anomaly between the Government's position here and its position before the Supreme Court in *Mandoli v. Acheson,* 344 U. S. 133, 135, where it conceded, and the Supreme Court agreed[7] that "the choice of taking the oath or violating the law was, for a soldier in Fascist Italy, no choice at all.[8]

In that same opinion of the Attorney General (41 Op. Atty. Genl. No. 16), he said (p. 3):

> ". . . Generally, it may be assumed that an act performed under legal compulsion lacks the voluntariness of choice that is essential to accomplish expatriation . . ."

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[6]The absence of appeals in these two cases is explained by the fact that subsequent to these trial court decisions, the plaintiffs were restored to their United States citizenship under the provisions of Section 317c of the 1940 Nationality Act (8 U. S. C. 717c), now repealed.

[7]The fact that the Government confessed error and that the Supreme Court acquiesced, is not to be passed over lightly. It is firmly established that the Supreme Court is in no way bound by the Government's confession of error and will independently examine the issues involved. (*Gibson v. United States,* 329 U. S. 338, n. 9; *Young v. United States,* 315 U. S. 257, 258-259). And this was demonstrated in *Weber v. United States,* 315 U. S. 787, where the court affirmed the lower court despite the Government's confession of error. (Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States,* p. 666 (1951 ed)).

[8]Both the courts in *Lehmann* (206 F. 2d at 598) and in *Alata v. Dulles,* 221 F. 2d 52, 55 (C. A. D. C., 1955), the latest appellate case on the subject, felt constrained to comment upon the anomalous position of the Government.

We submit that this pronouncement by the Attorney General is correct and that in different language he is saying what the courts in *Lehmann* and *Augello* said: that military service due to conscription is presumptively and *prima facie* involuntary.

2.

Plaintiff's Burden Is a Very Light One in a Case Like This (Reply to Appellee's Br. 9-10).

As the cases cited and discussed by appellant so clearly demonstrate, appellee's reliance upon 8 U. S. C. 802, to prove his case, is misplaced. He misconceives the purpose and effect of that section.

Appellee cites (Br. 9), *Dos Reis ex rel. Camara v. Nicolls,* 161 F. 2d 860 (C. C. A. 1, 1947). That case is entirely favorable to and supports appellant. As *Dos Reis* points out (161 F. 2d at 868), Section 402 of the 1940 Nationality Act (8 U. S. C. 802) "does not enlarge the content of §401(c)." There can be no loss of citizenship under 8 U. S. C. 801(c) unless the action is voluntary.

Whatever may be the ultimate burdens of the parties in a case like this it is clear that 8 U. S. C. 802 cannot aid appellee in this case because, under the circumstances here, its force is quickly and early spent. For, as the Supreme Court said in regard to the section from which 8 U. S. C. 802 was taken (Sec. 2 of Chap. 2534 of the Act of March 2, 1907; 34 Stat. 1228; 8 U. S. C. 16 and 17):

> "(I)t is a presumption easy to preclude and easy to overcome."
>
> *United States v. Gay,* 264 U. S. 353, 358.

Accord:

Camardo v. Tillinghast, 29 F. 2d 527, 530-531 (C. A. 1, 1928);

United States v. Eliasen, 11 F. 2d 785, 786 (D. C., W. D. Wash., 1926);

In re Alfonso, 114 Fed. Supp. 280 (D. C., D. N. J., 1953).

Moreover, the last three cited cases, as well as *Garcia Laranjo v. Brownell,* 126 Fed. Supp. 370, 372-373 (D. C., N. D. Cal., 1954), make the point, approving the opinion of Attorney General Wickersham (28 Op. Atty. Genl. at 508), that the section has no other purpose than to fix a time limit for a citizen residing overseas beyond which the Government is relieved of the obligation to protect such citizens residing abroad, and that the section does not establish a rule of expatriation.

Kawakita v. United States, 343 U. S. 717, cited by appellee (Br. 10), again supports appellant and not appellee.[9] That case makes it very clear that it was following the court's previous established rule in the *Gay* case that the presumption of 8 U. S. C. 802 is "easy to preclude and easy to overcome," for it said (343 U. S. at 723-725):

> ". . . He (Kawakita) had a dual nationality, a status long recognized in the law . . . The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citi-

[9]In that case the Government stoutly and successfully resisted, for the purpose of sustaining a prosecution for treason, the contention that there had been expatriation.

zenship does not without more mean that he renounces the other . . .

"As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other . . ."

It is clearly demonstrated, we submit, that even if 8 U. S. C. 802 were a part of appellee's proof in this case, it was quickly and completely overcome by the evidence that appellant's military service was due to conscription under law, to say nothing of the fact that the conscription was during time of war in militaristic, tyrannical Japan.

B.

On the Ordinary Burden of Proof the Finding by the Trial Court That Appellant's Military Service Was Voluntary, Is Not Supported by the Evidence and Is Clearly Erroneous (Reply to Appellee's Br. 10-11).

We believe that the case should be disposed of on the basis of the principles of law above discussed. Appellee having presented no evidence to rebut the presumption of involuntary conduct, appellant was entitled to judgment and is entitled to a reversal here. (*Lehmann v. Acheson,* 206 F. 2d 592 (C. A. 3, 1953); *Perri v. Dulles,* 206 F. 2d 586 (C. A. 3, 1953); *Augello v. Dulles,* 220 F. 2d 344 (C. A. 2, 1955); *Yoshida v. Dulles,* 116 Fed. Supp. 618 (D. Haw., 1953); *Gensheimer v. Dulles,* 117 Fed. Supp. 836 (D. C., D. N. J., 1954).) We suggest that the facts upon which appellee relies are not sufficient to overcome appellant's showing of involuntary conduct nor to make a showing of voluntary conduct.

Appellee relies to sustain its contention that the terrible punishment of loss of citizenship should be imposed upon appellant[10] on two written statements signed by him [Exs. "A" and "D"] admitted into evidence over objection.[11]

Exhibit "D" is an amazing document, as are the statements therein contained, amazing. It was made on January 13, 1950, before two soldiers of the American Occupation Forces [R. 73].[12] *after* appellant had filed the within law suit[13] and *in connection with his coming to this country* on a Certificate of Identity under 8 U. S. C. 903 *for the purpose of the suit!* [R. 71]. It reads as though it were made by a man in a trance; by a man thoroughly cowed and susceptible to every bidding of his tormentors.

Thus, in the very statement *made for the purpose of facilitating his return to this country as a citizen,* the statement reads [Ex. D, p. 2]:

> "I do not possess the rights to return to the U. S. and *if I do return to the U. S. I will endanger the safety of the U. S."* (Italics added.)

It is incomprehensible that a man, making a statement for the very purpose of assisting his return to the United States, who makes such a statement can be said to have been in his sound mind and acting freely and voluntarily.

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[10]*Cf. Kawakita v. United States,* 343 U. S. 717 for a different attitude by the Government when it considers that a dual citizen did more than was required of him by reason of his dual citizenship status.

[11]We have previously pointed out (Op. Br. 16-18) how this so-called "lying" by appellant previously in Japan, was as to immaterial matters, and how, in any event, under the circumstances in which it was done, is entitled to little, if any, weight on balance.

[12]The circumstances under which the statement was made will be discussed below.

[13]October 18, 1949. [R. 6.]

Appellee relies (Br. 11) upon the statement in Exhibit "D" as to the reasons for appellant's entry into the Kempetei, an act performed after he was already involuntarily, as a matter of law, in the Army.

Aside from a consideration of the circumstances under which the statement was made and the obvious wording of the statement by the American soldiers for the very purpose of harming appellant, we submit that the statement is utterly irrelevant to the issues of this case. We suggest that once a person is involuntarily required to serve in the army, and there is no way to get out, as is the case here [see Ex. 16, *Matsuye* case, Japanese Military Service Law], his preference for one branch of the service as against another neither adds to nor detracts from the involuntary nature of his service. Appellee's argument on this score is, in effect, that appellant by his subsequent conduct has "ratified" a previously expatriating act. The Government has advanced this argument before and it has been rejected. In *Pandolfo v. Acheson,* 202 F. 2d 38, 41 (C. A. 2, 1953), the court said:

> "If the 1933 oath was taken voluntarily, it needs no ratification as an expatriating act. If it was done under duress, subsequent conduct cannot make it voluntary."

See also:

Baumgartner v. United States, 322 U. S. 665, 677.

Nor does appellee's reliance (Br. 11) on the statement by appellant that he took a daily oath to do his best for the Emperor and for Japan bolster his case. Compare a similar fact, in *Kawakita v. United States,* 343 U. S. 717, 723-724. There the Government sought to prevent expatriation and was successful in taking a contrary position to that it takes here.

The case, thus, is not one which can be blandly disposed of as simply one of a trial court not believing appellant. As to what fact was appellant not to be believed? Certainly there is no question but that appellant was drafted pursuant to the compulsory military service law from which there was no escape, and that this was done under the circumstances then extant in Japan [see *Matsuye* Exs. 13, 14, 15 and 16].

To interpolate from *Acheson v. Maenza,* 202 F. 2d at 459: the evidence in this case "must be considered in connection with the well known ruthlessness of the (Japanese) regime which (in December, 1944) would hardly have tolerated resistance to its draft laws by an admitted national of (Japan)." Appellant obeyed the draft order, it will be remembered, because had he not done so, in the words of appellant, "the gendarme will get me, and I feared that I may be punished, and I also feared about the welfare of my family, and then my family be treated as a traitor perhaps if I take that action." [R. 27, 28.]

Of like effect as *Maenza* is *Alata v. Dulles,* 221 F. 2d 52 (C. A., D. C., 1955), calling attention to the Supreme Court's decision in *Mandoli v. Acheson,* 344 U. S. 133, and to the "strong" rule that "factual doubts are resolved in favor of citizenship" (221 F. 2d at 54 and 56).

The *Alata* case, as well as the previously cited *Perri, Lehmann* and *Augello* cases are doubly important because in them the Circuit Courts reversed trial courts on the very issue of voluntariness.[14]

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[14]There perhaps has not been sufficient time for a decision on certiorari in the *Augello* and *Alata* cases but, Shepard's Federal Reporter Citations fails to disclose that certiorari was sought in the *Lehmann* or *Perri* cases. In the light of the Government's conduct in the *Mandoli* case, we believe this absence of a request for review is significant.

Compare, also, similar action by this court in *Fukumoto v. Dulles,* 216 F. 2d 553, where the appellant actually applied for naturalization in Japan and the trial court found this to have been voluntary. This court said (216 F. 2d at 555):

> "It is apparent the District Court had no proper realization of what motivation drove Fukumoto to apply for citizenship."

C.

The Voting Issue (Reply to Appellee's Br. 12).

Since appellee agrees with appellant as to the proper disposition of this issue in the case, no extended reply is submitted.

We call the attention of the court however, to Senate Report 1178, 83rd Congress, 2nd Session, to accompany S. 1303 (the Watkins Bill), wherein the committee in reporting favorably on the bill, said (p. 4):

> ". . . Under the circumstances as they existed at the time the elections were held in Japan it becomes apparent that many of the former United States citizens unintentionally lost their citizenship under circumstances which amounted to duress, such as fear of loss of their ration cards, employment, or other vital necessities or the fear of the possible consequences which they might suffer in view of the admonition and urging by the occupation authorities to vote . . ."

D.

Exhibits "A," "C" and "D" Were Improperly Admitted Into Evidence (Reply to Appellee's Br. 13-14).

We have shown above how nothing contained in these exhibits should be permitted to defeat appellant's case. We discuss their admissibility, however.

Since appellant testified in court substantially the same as in Exhibits "A" and "C," under the trial court's own theory as to the admissibility of such documents [R. 66], they should not have been admitted.

Appellee's main reliance is upon Exhibit "D."

As to its admissibility on impeachment grounds, this cannot be because when confronted with this statement, appellant admitted making it [R. 57] as well as the various statements in it [R. 59, 61].

Nor was it admissible on a theory of its being an admission.[15]

We submit that the circumstances under which the statement was obtained offends the ordinary sense of justice, violates all concepts of fair play, and its admission into evidence violated appellant's right to due process of law.

Thus the following appears from the record: that the statement was given to two American soldiers who were in the CIC, defined by appellant as the Intelligence Corps of the United States Army, and believed by appellant to be M.P.'s [R. 78]; that he was forced by these soldiers

---

[15]When the Exhibit was first offered into evidence [R. 65], the court sustained an objection thereto and explained why. [R. 66.] Then later, without explaining the reason for changing its ruling, the court admitted the Exhibit. [R. 81.]

to say that he entered the Kempeitai to render greater service to Japan [R. 59]; that he was "pressed" to make the statement [R. 71]; that he "was struck five or six times" in connection with the making of the statement [R. 72]; that he was told by the soldier "to write all these things which I didn't have in mind" [R. 73]; that the statement was written after he had been struck [R. 79]; and that "If I wasn't afraid of being beaten up again, I wouldn't have written that statement" [R. 79].

In the light of these circumstances, and bearing in mind the purpose for which the statement was being given, as well as the legal irrelevancy of the statements themselves, we submit that it was gross error and highly prejudicial for Exhibit "D" to have been admitted or considered.

There is no question, of course, but that just as a confession in a criminal case, a prior "admission" even in an ordinary civil case is not admissible if it were not voluntarily made. (*International Paper Co. v. Delaware & H. R. Corporation,* 73 Fed. Supp. 30, 33 (D. C., N. D. N. Y., 1938): "(A)n admission is something voluntarily said or perhaps done.")[16]

Accord:

Hoffman v. Overbey, 137 U. S. 465, 11 S. Ct. 157, 34 L. Ed. 754;

Gaines v. Hennen, 24 How. (U. S.) 553, 16 L. Ed. 770, 788.

---

[16]*Cf.* also this statement by the court in connection with points A, B and C, above: "Where . . . the person charged . . . is compelled to use the symbol . . . by the requirements of public policy, whether he will or not, it loses its character as a voluntary act. . . ." (73 Fed. Supp. at 35).

The court below erroneously, we submit, refused to apply this rule of law. Thus the court said [R. 66]:

> "(T)his was not a criminal case nor is this supposed to be a confession, and so it was not necessary to establish the voluntary character by going into it."

Moreover, there is another serious respect in which the lower court's treatment of the exhibit was erroneous. When appellant sought to testify as to later events showing mistreatment of him by the CIC [R. 73][17] in connection with Exhibit "D," the court excluded the evidence, ordering it stricken from the record [R. 75]. The court's reasoning was (*ibid.*):

> ". . . it doesn't tend to prove or disprove anything that was required at the time that occurred. In other words, if he made the statements in January, 1950, anything that happened subsequent to January, 1950, couldn't in any way have induced him to have made the statements in January, 1950.
>
> ". . .
>
> ". . . anything subsequent to the date of the statements in 1950 is not admissible for the purpose of proving that he was coerced or that duress was used in his making of these statements."

This ruling was consistent with *Pandolfo, supra.* Yet the court admitted the exhibit containing the statement of conduct subsequent to conscription upon which appellee so heavily relies. If the occurrences subsequent to the

---

[17]Appellant testified that in connection with later interrogation by the CIC as to Exhibit "D", he was "struck" [R. 73]; he was questioned so severly that he "became ill and fainted" (*ibid.*); that he was "told to appear every day for four or five days consecutively" (*ibid.*). But this testimony was stricken. [R. 75.]

making of the statement of January, 1950, do not "tend to prove or disprove" [R. 75] the voluntary character of the statement, no more do the occurrences, as *Pondolfo* points out, subsequent to the conscription into the army tend to prove or disprove the voluntary character of the Army service.

Conclusion.

The judgment should be reversed and appellant declared to be a national of the United States.

Respectfully submitted,

WIRIN, RISSMAN & OKRAND,
A. L. WIRIN,
FRED OKRAND,
Attorneys for Appellant.

No. 14459

United States
Court of Appeals
For the Ninth Circuit.

JOHSEL NAMKUNG,

Appellant,

vs.

JOHN P. BOYD, District Director of Immigration and Naturalization at the Port of Seattle, State of Washington,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-19-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 3670

THE UNITED STATES OF AMERICA, ex rel. JOHSEL NAMKUNG,

Petitioner,

vs.

District Director of Immigration and Naturalization at the Port of Seattle, State of Washington, JOHN P. BOYD,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division:

The petition of Johsel Namkung, by and through his attorneys, the undersigned, respectfully shows as follows:

I.

Petitioner is now held in custody in restraint of his liberty by color of the authority of the United States and he is presently detained in the Immigration Station, Seattle, King County, State of Washington, within the Western District of Washington, Northern Division.

II.

Petitioner is held pursuant to a detention order of the Immigration and Naturalization Service and

is being held for immediate deportation to South Korea.

III.

Petitioner was served with a warrant of arrest on July 25, 1952, and a hearing under said warrant was thereafter held pursuant to authority contained in and jurisdiction conferred by sections 19 and 20 of the Act of February 5, 1917, as amended (8 U.S.C. 155, 156).

IV.

That at a subsequent hearing upon said warrant before the Immigration and Naturalization Service a charge was lodged under section 241(a)(1) of the Immigration and Nationality Act that petitioner was at the time of entry a member of a class of aliens excludable by the Act of October 16, 1918, as amended, being an alien who was affiliated with the Communist Party of the United States and petition on February 19, 1953, was ordered deported from the United States on the lodged charge only.

V.

That Act of June 27, 1952, c. 477, Title II, Chapter 5, section 243, 66 Stat. 212(h), (8 U.S.C.A. section 1253(h)), provides as follows:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

VI.

Petitioner in his Immigration file (file No. A6 795 007) on April 15, 1953, submitted a 6-page statement of why petitioner feared deportation to Korea.

VII.

Petitioner on or about October 27, 1953, at the request of respondent herein and in affidavit form, submitted a formal request for stay of deportation and in a 5-page affidavit submitted material to support petitioner's claim of persecution in the event of his deportation to Korea.

VIII.

On or about December 10, 1953, a hearing was held before Mr. Robert L. Needham of the Immigration and Naturalization Service, at which time, petitioner gave sworn testimony and introduced exhibits and evidence, all bearing on his claim of physical persecution in the event of his deportation to Korea.

IX.

That no evidence whatsoever has been introduced to controvert the testimony of petitioner in person and by affidavit and the testimony of his witnesses.

X.

That petitioner has exhausted his administrative remedies in this action.

XI.

That jurisdiction of this court arises under Section 2241, Title 28, United States Code, in that peti-

tioner is imprisoned under and by color of the authority of the United States, and he is in custody in violation of 66 Stat. 212(h) set forth above in that the Attorney General has made no finding of the fact that petitioner will not be subject to persecution in the event of his deporation to Korea, or if such a finding has been made by the Attorney General, it is arbitrary and without basis in fact.

Wherefore, petitioner prays that a writ of habeas corpus be issued liberating petitioner, or in the alternative petitioner prays that the Honorable Court issue an Order to Show Cause directing the respondent to show cause why the writ should not be granted, and for such other and further relief as to the court may seem just and proper, and pending the determination of the issues herein, that he be released on bond of $500.00.

MacDONALD, HOAGUE & BAYLESS,

By MacDONALD, HOAGUE & BAYLESS,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This Matter having come on before the undersigned District Judge of the above-entitled court, in open court, on the petition of Johsel Namkung for a writ of habeas corpus, and the court having considered said petition, and being advised in the premises; now, therefore,

It Is Hereby Ordered that John P. Boyd, District Director of Immigration and Naturalization, Seattle, Washington, or such other person as may be temporarily acting in the capacity of District Director of Immigration and Naturalization, be, and he is hereby ordered to appear before the undersigned judge of the above-entitled court at his courtroom in the United States Courthouse in the City of Seattle, King County, Washington, at the hour of 11 a.m. on Monday, the 5th day of April, 1954, then and there to show cause, if any cause there be, why the prayer of Johsel Namkung for a writ of habeas corpus, directing that he be forthwith temporarily released from custody of said Immigration and Naturalization service, should not be granted. . . .

Done in Open Court this 26th day of March, 1954.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by:

/s/ KENNETH A. MacDONALD,
Attorneys for Petitioner.

[Endorsed]: Filed March 26, 1954.

[Title of District Court and Cause.]

RETURN TO THE ORDER TO SHOW CAUSE

John W. Keane states that he is an attorney with the United States Department of Justice, Immigration and Naturalization Service, Seattle, Washington; that in his official capacity he is authorized to make in behalf of John P. Boyd, District Director and respondent herein, and hereby does make the following return to the order to show cause.

It is respectfully urged that upon its face the petition for a writ of habeas corpus is insufficient in law and therefore the order to show cause should be quashed for the following reasons:

(a) The petitioner does not allege facts to show that the Attorney General, or his authorized delegate, denied the petitioner an opportunity to present evidence on the subject of persecution or refused to consider the evidence presented by the petitioner.

(b) It is not alleged that the procedure followed in considering the petitioner's application to the Attorney General for a stay of deportation was irregular, unfair, or not in compliance with the statute and regulations applicable in such cases.

(c) A finding of fact by the Attorney General with respect to the likelihood of physical persecution is not required as a matter of law under the statute.

(d) The withholding of deportation in cases where the alien fears physical persecution rests wholly in the administrative judgment and opinion of the Attorney General, and such opinion is not subject to review by the court to the extent that they could substitute their judgment for that of the Attorney General.

I.

The petitioner is in the custody of the respondent by virtue of a lawful warrant of deportation issued April 8, 1953, after notice, and a hearing which resulted in an order of deportation on February 19, 1953. No appeal was taken by the petitioner from the order of deportation.

II.

The petitioner is thirty-three years of age, a native and citizen of Korea, who last entered the United States at Anchorage, Alaska, March 10, 1949. He was admitted for permanent residence as a nonquota immigrant to pursue the occupation of a professor. He had previously resided in the United States from October 24, 1947, to November, 1948, as a student.

III.

The warrant of deportation provides that he is subject to deportation under Section 241(a) of the Immigration and Nationality Act in that he was at the time of entry a member of a class of aliens excluded by the Act of October 16, 1918, as amended: an alien who was affiliated with the Communist Party of the United States.

About October 8, 1953, the petitioner applied for a stay of deportation based upon the claim that he would be subject to physical persecution if he were deported to Korea. On December 2, 1953, he was examined by Robert L. Needham, a qualified immigration officer, and was afforded an opportunity to present evidence in support of his claim. At that time he was represented by counsel. The record of this interview together with the exhibits introduced was forwarded to the Assistant Commissioner, Detention and Deportation Division, Washington, D. C., on December 14, 1953, for a decision upon the application for a stay of deportation. There was thereafter forwarded on January 5, 1954, for consideration of the Assistant Commissioner a letter received from the Korean Consul General at San Francisco, California, stating that the petitioner would not be subject to physical persecution but, on the contrary, would be welcomed as a prodigal son. On February 15, 1954, Assistant Commissioner W. F. Kelly directed the following communication to the respondent herein:

> "After careful consideration of the material the alien has submitted and of his own testimony in support of his claim that he would be subject to physical persecution if deported to Korea, it is not my opinion that the alien would be subject to physical persecution if deported to that country. You should proceed, therefore, to execute the outstanding warrant of deportation * * *"

IV.

Pursuant to demand, the petitioner surrendered into the custody of the respondent at 9:00 a.m., March 26, 1954, for deportation. He was thereafter released on an immigration bond in the sum of $1,000, pending determination of this action.

V.

There is attached and made a part of this Return, identified as Exhibit A, a transcript of the interview accorded the petitioner December 2, 1953, on his application for a stay of deportation, together with Exhibits No. 2 and No. 3. Exhibits Nos. 1, 4 and 5 have been requested by telegram from the petitioner's file at Washington, D. C., and will be made a part of the Return when they are received.

There are also attached to and made a part of this Return, and identified as Exhibits B, C, D and E, a copy of the warrant of deportation relating to the petitioner; a copy of a letter from the respondent dated December 14, 1953, forwarding the record (Exhibit A) to the Assistant Commissioner, Washington, D. C., for his opinion; a copy of a letter from the respondent dated January 5, 1954, forwarding to the Assistant Commissioner a copy of a letter received from the Consul General of Korea. The original letter from the Consul General is attached thereto. A copy of a letter from the Assistant Commissioner, addressed to the respondent, dated February 15, 1954, in which he states that it is not his opinion that the petitioner

would be subject to physical persecution if deported to Korea.

VI.

The respondent admits and denies the allegations in the petition as follows:

Allegations numbered I through VIII, inclusive, and X are admitted; allegation No. IX and that portion of allegation No. XI which avers that the decision of the Attorney General is arbitrary, is denied.

Wherefore, it is prayed that the petition for a writ of habeas corpus be dismissed and the rule to show cause quashed.

/s/ JOHN W. KEANE,
Attorney for the Respondent, John P. Boyd, District Director, Immigration & Naturalization Service, Seattle, Washington.

United States of America
Department of Justice
Immigration and Naturalization Service
Seattle, Washington

April 1, 1954.

CERTIFICATION

By Virtue of the authority vested in me by Title 8, Code of Federal Regulations, Section 2.1, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I Hereby Certify that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Johsel Namkung, File No. A-6 795007, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ JOHN P. BOYD,
District Director, Immigration and Naturalization Service, Seattle District.

EXHIBIT A

United States Department of Justice
Immigration and Naturalization Service
Seattle, Wash.

Respondent: Johsel Namkung
File: A6 795 007

Hearing

Date: December 2, 1953.
Place: Seattle, Washington.
Examining Officer: Robert L. Needham.
Stenographer: Mari Ohara.
Language Used: English.
Respondent's Counsel: Kenneth A. MacDonald.

Exhibit A—(Continued)

Examing Officer to Johsel Namkung:

Q. Please state your full name for the record.

A. Johsel Namkung.

Q. The purpose of this proceeding is to give you an opportunity to present any evidence bearing on your claim that, in the event you are deported to Korea, you will be subject to persecution there. During this proceeding you are advised that you have the right to have an attorney represent you. Do you wish an attorney to represent you at this proceeding? A. Yes.

Q. Is Attorney Kenneth A MacDonald, who is present, the attorney you have chosen to represent you? A. That's right.

Examing Officer to Counsel:

Q. Mr. MacDonald, will you identify yourself for the record?

A. My name is Kenneth A. MacDonald, Attorney of Law at Seattle, with offices at 602 New World Life Building, Seattle 4, Washington. I am admitted to practice before the Board of Immigration Appeals and the Immigration Service, and I have filed an appearance in this case and have served as Mr. Namkung's attorney during most of these proceedings.

Q. Are you ready to proceed, Mr. MacDonald?

A. Yes, I am, Mr. Needham.

Exhibit A—(Continued)

Examining Officer to Counsel and Respondent:

Q. During this proceeding, you are advised that you may submit any evidence or produce any witnesses bearing on the matter at issue. Do you understand that? A. Yes. (By both.) [1*]

Examining Officer to Respondent:

Q. Mr. Namkung, will you stand and raise your right hand to be sworn. (Respondent complies.) Do you solemnly swear that the statements you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes, I do.

Examining Officer to Counsel:

Counsel may proceed.

Counsel to Respondent:

Q. Mr. Namkung, will you state your name, please? A. My name is Johsel Namkung.

Q. Your present address?

A. 2017 - 18th Avenue, South.

Q. Are you married? A. Yes, I am.

Q. Your wife's name?

A. Helen Mineko Namkung.

Q. And her citizenship now?

A. I really don't know. We came to this country as Korean citizens, but now the passport has been expired and hasn't been extended to valid date.

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

Exhibit A—(Continued)

Q. Do you have any children?

A. Yes, I do.

Q. Will you state their names and ages, please?

A. Irene, age 10; Paulette, age 7.

Q. How much of your life, stated roughly, Mr. Namkung, have you lived in Korea?

A. I lived there since my birth to the age of 16, and I returned to Korea several times after that until 1945 when I repatriated to Korea and stayed until 1947.

Q. Now, Mr. Namkung, do you have any brothers or sisters?

A. Yes, I do. I have five brothers and two sisters.

Q. Would you, merely for the record, state their names and addresses as you presently know them?

A. Joseph, 471 Kishimoto Building, Marunouchi, Tokyo;
Daniel, 60 Chongpadong Second Street, Seoul, Korea;
David, address same as Joseph's;
Moses, residing in Seattle; [2]
Timothy, same as Joseph's;
Won Suk, oldest sister, whereabouts unknown;
Johanna, residing with Daniel.

Q. Now, Mr. Namkung, have you recently received a letter from your brother Joseph H. Namkung, sent from 417 Kishimoto Building, Marunouchi, Toyko, Japan? A. Yes, I have.

Q. Do you recall the date of that letter?

Exhibit A—(Continued)

A. I think it was around the end of October.

Q. Of what year? A. 1953.

Q. Mr. Namkung, I am handing you two pieces of paper stapled together and stapled to an envelope addressed to Mr. Johsel Namkung, 2017 - 18th Avenue, South, Seattle, Washington, U.S.A., bearing two Japanese stamps. I ask you if you will identify what that is?

A. This is the letter I received from my brother Joseph.

Q. Mr. Namkung, have you read that letter?

A. Yes, I have.

Q. Now, handing you, Mr. Namkung, a 2-page, unstapled at the present time, sheet in English, appearing to be a letter from Joseph H. Namkung of 417 Kishimoto Building, Marunouchi, Tokyo, Japan, and addressed to Johsel Namkung, 2107-18th Avenue, South, Seattle, Washington, U.S.A., and dated October 20, 1953, I will ask if you will state, please, what the first and second pages are.

A. The first page consists of the translation of the letter I received from Joseph.

Q. And the second page?

A. And the second page is a certificate as to the translation is accurate.

Q. You made the translation?

A. Yes, I did.

Counsel to Examining Officer:

Q. Mr. Needham, I should like to offer in evidence both the first exhibit, being the letter from Joseph H. Namkung, and——

Exhibit A—(Continued)

Counsel to Respondent:

Q. Mr. Namkung, is that written in Japanese or Korean? A. That is in Korean.

Counsel to Examining Officer: [3]

I would like to offer in evidence, also, the translation of that letter as made today by Mr. Namkung and certified by him under oath to be correct. Now, that would be the second exhibit, being the translation. If you wish, Mr. Namkung could read that into the record, but the letter speaks for itself.

By Examining Officer:

The letter from Joseph H. Namkung, described by counsel, together with the English translation of the letter and the certification by respondent of his correct translation of the letter, will be received into evidence and marked "Exhibit 1."

Counsel to Respondent:

Q. Now, Mr. Namkung, referring to your living in Korea before coming to the United States, at that time did you know of a public official known as Syngman Rhee? A. Yes.

Q. What was his position at that time, in what then constituted Korea?

A. He was the President of the Republic of Korea.

Q. And that republic included what is now North and what is now South Korea?

Exhibit A—(Continued)

A. No, it was only governing Southern Korea, South portion of Korea.

Q. Now, Mr. Namkung, do you recall, before leaving Korea, of your ever having criticized Syngman Rhee in Korea? A. Yes, I have.

Q. Did you criticize him in public?

A. Yes, I think I have criticized him in public a few times.

Q. Do you remember attending any meetings in Korea at which time he was criticized?

A. Well, I have to make it clear that in 1947 when I first came to this country Syngman Rhee wasn't President of Korea, and he was President when I went back to Korea in 1948, and during my second visit, I didn't have chance to appear before the public, and if I had criticized him in public, I might have been persecuted then, so my criticism of Syngman Rhee in public was back in 1947.

Q. Now, Mr. Namkung, when did you come to the United States the first time?

A. It was October, 1947.

Q. And you have already testified in a proportion of this proceeding, have you not, of meeting with some people of Korean nationality here in the city of Seattle after you came to this country?

A. Yes, I have. [4]

Q. And you have testified, have you not, that this was a University group? A. Yes.

Q. Of whom Harold Sunoo was one?

A. Yes.

Exhibit A—(Continued)

Q. And you knew the other people in that group?

A. You mean at the time I first came?

Q. Yes.

A. Harold Sunoo was the only person.

Q. Do you recall a subsequent time when you went back to Korea, and was the purpose of that to get your children to bring them back? A. Yes.

Q. You and your wife were, at that time, in the United States? A. Yes.

Q. And you did go to Korea? A. Yes.

Q. Do you remember, at that time, being asked to take a communication to Korea?

A. Yes, I was.

Q. And you did take it? A. Yes, I did.

Q. You have no knowledge of what was in that communication?

A. I had a knowledge of the content of the letter.

Q. And you took that letter with you?

A. Yes.

Q. Do you remember what you did with that letter?

A. I handed it to a person that I previously known whom I believe had some contact with North Korean Government.

Q. And you handed it to that person where?

A. In Seoul.

Q. When you handed it to him, was it before the North Korean aggression of June 25, 1950?

A. Yes.

Q. It was? A. Yes. [5]

Exhibit A—(Continued)

Q. Have you subsequently seen this communication or a copy of it?

A. No, I only saw the translation of the communication in ditto copy.

Q. And that was submitted to you by the investigators for the Immigration Service? A. Yes.

Q. To your best recollection, this communication certainly was not a friendly communication to Syngman Rhee? A. No, it was not.

Q. Now, Mr. Namkung, do you presently have a passport? A. No, I don't.

Q. Do you know where your passport is?

A. I returned it to Mr. Gates at the Deportation Section, and I assume it is now returned to South Korean Government.

Q. Do you assume that because of that letter from your brother that he saw the passport?

A. That's right.

Q. That it is with the South Korean Government? A. Yes.

Q. Now, Mr. Namkung, do you know what a writ of habeas corpus is?

A. Not precisely, but I understand what it is.

Q. Does such a writ exist in either North or South Korea, to your knowledge?

A. Since I haven't studied the constitution and federal laws closely, I cannot tell of the existence of writ of habeas corpus. However, I am positive that such practice is not existing in South Korea and North Korea.

Q. Now, Mr. Namkung, in previous proceedings

Exhibit A—(Continued)

in this deportation action, have you submitted a statement concerning your opposition to the, what you have called the "terroristic" methods of both the Communist Party and Mr. Syngman Rhee?

A. That's right.

Q. And in your first statement so submitted, dated 15th day of April, 1953, do you also recall setting forth news reports or magazine reports concerning the methods by which Mr. Rhee became President of the South Korean Republic, the way he ran the country, the police methods of the South Koreans? A. Yes, that's correct.

Q. Showing you what is presently unstapled but six pages of typewritten material, I ask you if it is a copy of material which you have already submitted to the Immigration Service? A. Yes, that is.

Q. And that was signed by you?

A. Yes. [6]

Q. And I ask you if you wish to resubmit this as a part of this hearing, mindful of the fact that the Immigration officers already have it, but would you like to have it included as a part of this hearing?

A. Yes.

Q. Mr. Namkung, I wonder if I could suggest that you sign this copy under today's date?

A. Yes, I will.

(Respondent signs copy.)

Counsel to Examining Officer:

Q. I would like to submit this copy as an exhibit to this transcript.

Exhibit A—(Continued)

A. Signed statement of Johsel Namkung, consisting of six pages, dated April 15, 1953, will be admitted as "Exhibit No. 2."

Q. Mr. Needham, I find and would like to offer for the record a signed verification dated 23rd day of April, which has been signed by me, that should be attached to the exhibit which has just been received.

A. This notarized certification, Counsel, does that refer to Exhibit 2?

A. Yes, it does, Mr. Needham.

Examining Officer to Respondent:

Q. Mr. Namkung, is it correct that you made your certification under oath, and it was sworn to as indicated? A. Yes.

Examining Officer to Counsel:

Q. Will the Counsel sign this certification?

A. Yes, I will.

(Counsel signs certification.)

Examining Officer:

Such signed certification will be attached to Exhibit 2 as part of such exhibit.

Counsel to Respondent:

Q. Mr. Namkung, you wish to reaffirm everything which has been said in Exhibit 2, is that right?

A. Yes.

Exhibit A—(Continued)

Q. Now, Mr. Namkung, I call your attention to an affidavit filed in this proceeding, the original of which was signed by you on the 27th day of October, 1953. I hand it to you and ask if this was prepared by you and if it contains more recent quotations than Exhibit 2 concerning Mr. Rhee's attitude toward the United Nations, toward the representatives of the United States, and particularly toward Mr. Rhee's political opponent named Chough Pyung Ok, who resisted [7] the freeing of the anti-Communist war prisoners by Mr. Rhee. Did you prepare this statement? A. Yes, I did.

Q. I ask, Mr. Namkung, if you would sign this copy? A. Yes, I will.

(Respondent signs copy.)

Q. And being mindful that this affidavit has been submitted to the Immigration Service, I ask you if you wish the affidavit and the material and the news and magazine quotations included therein to be submitted as an exhibit here and attached to this transcript? A. Yes, I do.

Counsel to Examining Officer:

Q. Mr. Needham, I would like to offer this affidavit dated October 27, 1953.

A. Signed carbon copy of such affidavit described will be admitted for record and marked "Exhibit 3."

Exhibit A—(Continued)

Counsel to Respondent:

Q. Mr. Namkung, showing you a news article from the Seattle Daily Times, sunset final edition of Wednesday, November 4, 1953, concerning Mr. Rhee's statement of on or about that day to fight to unify Korea, I ask if you would like it introduced as exhibit in this case? A. Yes, I do.

Q. Do you have any opinion, Mr. Namkung, as to Mr. Rhee's attitude of unification by force, if necessary; what effect that would have on you personally if you were, in the near future, to be sent to South Korea?

A. That clearly shows that the opinion of Syngman Rhee is to conquer North Korea presently governed by the Communists. That manifests hostilities toward Communism, and I, such as a carrier of a message which was hostile to Syngman Rhee to be delivered to North Korean Government officials, undoubtedly, would be persecuted if I were to be deported by the United States Government.

Q. Now, have you ever been a member of the Communist Party, Mr. Namkung?

A. No, I have never been.

Q. And you are not a member now?

A. No, I am not.

Q. And you are stating that under oath?

A. Yes.

Q. And you have stated under oath frequently?

A. That's right. [8]

Q. However, is it not true, Mr. Namkung, that

Exhibit A—(Continued)

an order of deportation has been issued because of your affiliation with an organization which was affiliated with the Communist Party of the United States? A. Yes.

Q. Is it your belief that this fact is known to the South Korean Government?

A. Yes, I think so.

Q. Is that belief based upon the letter of October 20, 1953, received from your brother Joseph Namkung?

A. That is one reason to believe. The other, it is my pure assumption but the way it wouldn't have been possible that the United States Government take possession of that letter I took personally to South Korea to be delivered to North Korea in 1948 without the cooperation of South Korean Government. Therefore, I believe South Korean Government knows about this implication.

Counsel to Examining Officer:

Q. Mr. Needham, I should like to offer as Mr. Namkung's exhibit the newspaper story in the Seattle Times, sunset final edition, dated November 4, 1953, concerning Mr. Rhee's desire to unify the Korean country by force if necessary.

A. Such newspaper article will be accepted and marked "Exhibit 4."

Counsel to Respondent:

Q. Mr. Namkung, can you state, of your own general knowledge, the duration of the present armistice in Korea? A. Yes, I do.

Exhibit A—(Continued)

Q. How long is that armistice to last?

A. I think it was three months or 90 days.

Q. From the cessation of hostilities?

A. That's right.

Q. Do you know, from your own knowledge, whether there was to have been a political conference held to determine the Korean problems within that period? A. Yes, I do.

Q. Has that political conference been held?

A. No, not yet.

Q. Do you have any knowledge of when the 90 days expires?

A. I don't remember the exact date, but it is sometime middle of January, 1954.

Q. And is it not true that that's the date that Mr. Rhee has stated he will take military action if Korea is not unified? A. That's correct. [9]

Q. Now, Mr. Namkung, handing you a news article entitled "ROKS May Court-Martial Ex-P.O.W.'s" apparently from the Seattle Times, Thursday, November 5, 1953, I ask you if you took that from the Seattle Times? A. Yes, I did.

Q. And does this concern the attitude of the South Korean Government towards those South Korean prisoners who gave in to the "brain-washing" of the North Korean Communists?

A. Yes.

Q. And you would like to have this submitted in evidence? A. Yes.

Counsel to Examining Officer:

Q. I offer it, Mr. Needham.

Exhibit A—(Continued)

A. Such article, Associated Press dateline of November 5, Pusan, Korea, will be accepted and marked "Exhibit 5."

Counsel to Respondent:

Q. Mr. Namkung, have you ever had occasion to observe personally the disregard with which human life is held in the Orient?

A. Yes, I have observed them so many times, although I cannot specify the date and place.

Q. From such observation, do you conclude that human life is as important in the Orient as it is in the United States?

A. No. Human life in Korea, not only Korea but throughout the Orient, is considered as much less important than to the Western countries.

Q. Mr. Namkung, as you understand them, are you devoted to the aims of the United Nations' forces in Korea today? A. Yes, I think I do.

Q. Are you and have you supported the Government of the United States to the best of your ability in fulfilling those United Nations' aims?

A. Yes, I think.

Q. And do you plan to continue to do so?

A. Yes, definitely so.

Q. Have you cooperated to the fullest extent possible with the Immigration Service?

A. Yes, I have been trying to.

Q. And has your wife, to your knowledge?

A. Yes. [10]

Exhibit A—(Continued)

Q. Mr. Namkung, do you have any fear for the safety of your wife and children in the event that all of you are deported to Korea?

A. There's no doubt, in the event I, together with my family, were deported to South Korea, we would all be executed in due course.

Q. Now, would you, in your own words, state to Mr. Needham your reasons why you think such execution would come about of you and your entire family?

A. Could I have a recess before I make this statement?

Examining Officer to Respondent:

Yes, if you wish to confer with your attorney, you may have a 10-minute recess.

Counsel:

Before the recess, I would like to ask a few questions if I may.

Counsel to Respondent:

Q. Mr. Namkung, what language do you speak?

A. I speak the Korean, Japanese languages and two dialects of Chinese language, and English, and reading knowledge of the German and French languages.

Q. And in what languages can you write?

A. I can write in Korean, Japanese, English and Chinese.

Q. And if called upon, Mr. Namkung, would you

Exhibit A—(Continued)

submit all of this knowledge to the Government of the United States?

A. Yes, I always been willing to offer my ability.

Q. To the Government of the United States in whatever they might ask you to do?

A. That's right.

Q. And would you offer to them any knowledge which you might have of conditions, or geography or history, in the Far East?

A. Yes, I have been to a certain governmental agencies, and I am willing to continue to do so, any United States Government agencies.

Q. And you would do this in an effort to maintain our democracy in its fight against totalitarianism? A. Yes.

(Recess.)

(Hearing resumed.)

Respondent Presents Dr. Frank G. Williston.

Examining Officer to Dr. Frank G. Williston: [11]

Q. Will you please stand and raise your right hand. Do you solemnly swear that the testimony you are about to make will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. Will you please state your full, correct name for the record?

A. Frank Goodman Williston.

Q. Are you a native-born citizen of the United States? A. Yes, Seattle.

Exhibit A—(Continued)

Q. What is your occupation?

A. I am professor at the University of Washington.

Q. And what is your specialty?

A. My special field is the American-Far East Policy, International Relations in the Far East, in general.

Examining Officer to Counsel:

Counsel may proceed to question the witness.

Counsel to Witness:

Q. Dr. Williston, have you recently been in the Far East?

A. I returned the latter part of September of this year.

Q. 1953? A. Yes.

Q. How long were you in the Far East at this time?

A. Little over two months. I left just at the end of the spring quarter and returned just before the fall quarter.

Q. What countries did you visit on this recent 1953 trip? A. Japan and Korea.

Q. And do you teach on the subject of Korea?

A. I teach a general survey course in Korean History and one in Korean Civilization.

Q. Do you also do any work on radio or television concerning Korea?

A. Yes. I have had a television program which ended last week in which I discussed my experi-

Exhibit A—(Continued)

ences in Korea, and I have a weekly radio program which is still going on in which I deal with the current developments in the Far East area, and of course that includes Korea.

Q. When were you last in Korea before the summer of 1953? A. 1936. [12]

Q. However, you kept in close touch with Korea through World War II? A. Yes.

Q. And then you kept in close touch with Korea subsequent to World War II and before the aggression of June, 1950? A. I've tried to.

Q. Dr. Williston, the record here in this proceeding will show that Mr. Johsel Namkung is a Korean who came to the United States and subsequently left the United States from the University of Washington, that at the time he left the United States he was meeting with a small group of Korean nationals alleged later to have been affiliated with the Communist Party of the United States. The record here has shown that Mr. Namkung denied and knew nothing of this affiliation. However, the record has shown that Mr. Namkung, upon returning to Korea to get his two children in the year 1948, did in fact take a communication with him from this Korean national group, that this communication was turned over to a friend of Mr. Namkung or at least a man he knew in Seoul, with the anticipation that the communication would be turned over to a responsible official of the North Korean Government. The record has shown that this communication was a com-

Exhibit A—(Continued)

munication directed, at least, against the policies of Mr. Syngman Rhee. The record will further show that approximately one year ago that Mr. Namkung was ordered deported from the United States on the grounds that he had belonged to an organization which was not the Communist Party of the United States but which was affiliated with the Communist Party of the United States. The record will show that Mr. Namkung had denied membership in this organization, nevertheless an order of deportation on that ground was made and no appeal was taken. Now this hearing, Dr. Williston, is concerned only with the fact of whether Mr. Namkung, if he were to be deported to Korea today, whether he or his wife and two children would suffer persecution if they were to now go to Korea. I wonder if you have an opinion on that issue?

A. I would be inclined to feel that this would take place. Now, how severe it would be, I don't know.

Q. You do have an opinion, Dr. Williston, and would you state the opinion and your reasons for holding the opinion in your own language?

A. I know that Dr. Rhee as of this summer, the tempo has been stepped up since my return, has been seeking to eliminate from both the civilian and military set-up those elements that he did not trust. The New York Times, Christian Science Monitor, since my return, both reported that purges and liquidations have been rather extensive. Some cases resulted in dismissal from office; other cases, arrests, and

Exhibit A—(Continued)

actual execution in some cases. Now, very few names have been given by the reports as coming from these journals, but some of these were merely suspects, people who allegedly have been sympathetic to the Communist cause. Margaret Higgins, the famous woman correspondent [13] for the New York Herald Tribune, a very responsible journal, stated, although very sympathetic toward Syngman Rhee, that to her knowledge men and women were shot for merely allegedly belonging to Communist groups. I know that, when Syngman Rhee's government came in with General MacArthur's forces in the Inchon landing, that they rounded up and after very cursory trials executed a large number, in fact executed so many that the foreign correspondents, the Americans, protested to such an extent that General MacArthur finally intervened and stopped it. I know, too, that when these same troops of South Korea preceded General MacArthur across the 38th Parallel toward the Yalu in search of the Communists, they gave them quasi trials and after little more than charges were made, again from the New York Times, men and women were rounded up and shot, and this became so flagrant and widespread that General MacArthur again had to intervene and order these troops sent back below the 38th Parallel. I, in talking with both the military personnel and correspondents in September, they certainly in general held the opinion that Dr. Rhee feels the situation is so crucial that he is again continuing this policy of eliminating all

Exhibit A—(Continued)

those whom he feels he cannot trust, and there is no habeas corpus, no formal judicial hearing in many of these cases. As far as I am able to find, I can't prove these cases, I don't know them personally, I would, on the basis of such testimony as evidenced in the New York Times and Christian Science Monitor that the only charge made against some of these men was earlier affiliations with the Communist movement and under those circumstances, I would feel quite probable, I can't swear to it, of course, but quite probable, that he would suffer persecution and perhaps worse.

Q. Dr. Williston, do you have any opinion or knowledge as to what is happening to some of Dr. Rhee's political opponents during the past year?

A. I recall that when he swore to change the structure of the government to provide for the election of President by direct vote instead of by assembly, the troops or youth groups surged to the assembly and threatened to conduct purges; Syngman Rhee, very much like Cromwell did in his days, eliminated those hostile to him. Some of these men were under arrest or are known to have been beaten, and some went into hiding, and some disappeared, whether for safety's sake or liquidated no one seems to know. I do know that a number of men who opposed openly have been manhandled and worse. This is common knowledge.

Q. Do you have any opinion, Dr. Williston, as to whether Korea in the next six months to a year,

Exhibit A—(Continued)

whether the tensions will be eliminated and life and property perhaps made more secure?

A. I should say that, until a settlement is reached by formal peace treaty or agreement, to continue operation on the present uneasy truce, the tensions are bound to increase rather than diminish. [14] Dr. Rhee has repeatedly declared that he will not be bound by any settlement. He will order his troops to move, and I talked to military officers on that point in September, and they expect obviously that he will make the effort to cancel all agreements we try to reach in terms of a settlement if it does not provide for the full and complete unification of Korea, and this, of course, does not only increase the tensions but the possibility of outbreak of war again. Furthermore, we know that in the last few weeks two agreements have been reached by the North Korean and Communist Chinese Government by which both of these Communist powers have not only sworn to support North Korea but offered substantial economic aid for the integration of the economic resources, particularly industries of North Korea, Manchuria, in China and Eastern Siberia. This means that neither Communist China nor Russia will willingly permit any honest and genuine unification of Korea, and since Dr. Rhee has sworn to achieve that, I don't see how one can do other than anticipate either an enforced retention on the part of the United Nations of Dr. Rhee by putting him under duress or running the risk of another war. In any event, there will be a tremendous tension.

Exhibit A—(Continued)

Q. Isn't there a critical date when this issue may or may not be resolved coming in the near future?

A. The immediate issue will be settled presumably by January; that is, the question of the prisoners who refused to return. The 90 days will expire, and Syngman Rhee insists that when that expiration date has been reached, he is absolved from all responsibility and free to act. He said just a few days ago that he hopes that his present allies will sympathize with him and support him. This they have refused to do, but it does indicate the gravity of the situation we are going toward now.

Counsel to Examining Officer:

Q. Do you have any questions to ask of Dr. Williston, Mr. Needham? A. Yes, I have.

Examining Officer to Witness:

Q. Dr., you referred to the landings made under General MacArthur and the executions that took place at the instigation of the South Korean Army officials, I presume?

A. Yes, civilian and army, South Korean civilian government.

Q. Were these executions by military law or civil law?

A. Apparently civil law. The reporters indicate that it was difficult to determine what was transpiring. They were being shot, and there were no formal trials. They were allegedly being accused of having collaborated during the period of Communist oc-

Exhibit A—(Continued)

cupation. This is the charge against them, and they were being shot without benefit of any [15] formal trial.

Q. Your knowledge of actual conditions in Korea since your return comes from articles in newspapers in this country?

A. Yes, and, for example, CBS correspondent who was there in Seoul at the time I was, who has since been transferred to Tokyo, and by broadcast and newspaper accounts, yes, that is the basis.

Q. You have indicated Syngman Rhee's, you might say, "violent" opposition to Communists which is understandable, but I presume you have considered his action in releasing the North Korean Communist prisoners, who apparently were former Communists, and has reportedly accepted many of them in his own armed forces.

A. Those were supposedly South Korean prisoners who had been taken contrary to the Geneva Convention. This has been very definitely proved; not just hearsay. When the North Korean Army came down and captured the, as they did in the early days of 1950, large blocs of South Korean prisoners, they forced a substantial number of these into the North Korean Army and, I think it has been pretty well established, in contravention of laws of warfare. When these were recaptured, these were the ones, as I understand Dr. Rhee's position, he was holding, and these are the ones he was insisting upon releasing on the grounds that they were forced into the army and not in any sense Communists.

Exhibit A—(Continued)

Q. However, weren't many of these prisoners also persons from North Korea?

A. Some of them.

Q. Also, quite a number of them were Chinese, isn't that correct?

A. No, not of that contingent, not of that released in June. Of course, Dr. Rhee has taken the position, and I can't prove it, that a substantial number of North Korean prisoners could not properly be labeled Communists but forced in. We now have a boy on the campus who was in Seoul at the age of 13. As they were forcing the boys into military service in North Korea, he hid in a hole in a back yard, and I have been inside the Communist territory in China in UNRRA work, and I know something of the pressures that were applied. They were inducted as fast as they could, but there were many there under compulsion. You may recall, during the days of fighting on the Yalu River front, large blocs of prisoners voluntarily surrendered even though they were winning. They sought to escape the Communist control.

Q. Although Syngman Rhee apparently is in control of South Korea, he does have political opposition, isn't that correct? A. That's right.

Q. As I understand, the leader of the strongest political party is Chough Pyung Ok, is that correct?

A. Yes, he is one of the outstanding ones. Rhee sought to change the constitution and provide for the election by popular vote rather than by assembly.

Exhibit A—(Continued)

The assembly was against it, and it indicates that he is one of the political elements hostile to him. [16]

Q. And is it your understanding that this existing campaign as portrayed in the newspapers, this campaign to rid his government of subversives, involves actual subversives and not people who might have been formerly attached to the Communist Party or affiliated?

A. Well, it's difficult to say. The newspaper accounts singled out the ones that are most conspicuous. One of them, who was a leading opponent in the last election, originally affiliated with the Communists, was subjected to considerable physical pressure in the campaign. Some of these, undoubtedly, are allegedly subversives, but the story one gets in terms of this drive throughout this summer has been he is trying to make sure that no one is in any political or military position to challenge his authority when the time comes when he chooses to defy the United Nations' position. I talked with American military officers who worked with the Korean troops; they all agreed, with whom I talked, that he was in the process of seeing to it that the men who conceivably might have resisted him would be in no position to resist him. This does not in any sense raise the question that he is wise or unwise. I think he is quite sincere and very much determined to achieve unification of Korea and there would be no peace in the Orient until that is achieved.

Q. Do you think, then, that the respondent, Mr. Namkung, if he were deported to Korea, he might

Exhibit A—(Continued)

be charged with conspiring against the interests of South Korea?

A. I think it's very probable. I think a very serious situation would develop.

Q. From your knowledge of South Korean judicial process, would you say that he would get a fair trial there?

A. There is no such thing at the moment, no writ of habeas corpus, no formal proceedings. Particularly, under these strained conditions I should say that the prospect of a fair trial in the terms of Western concept is extremely remote.

Q. Mr. Namkung has made the statement that also his wife and family would be in danger if he were sent back. Do you believe that his wife and children, never having any connection with the Communist Party, would also be arrested and charged with some offense?

A. I do know this, that historically this is true, all the way into contemporary times, that the family of a prisoner has been punished with the prisoner and that as late as the 19th Century before Japan took over, as part of the criminal procedure, the family of the condemned man was condemned with him. No formal charge has been made against Syngman Rhee that this same procedure is being applied, striking the entire family rather than against the man himself, on that I have no specific evidence, but I know Western reporters are making such a charge. The thing, of course, is that it aroused the Western correspondents to such an extent that finally they went to General MacArthur, that this had to stop, the exe-

Exhibit A—(Continued)

cution of women even with babies for being identified with their husbands in this charge of collaboration. [17]

Examining Officer:

I have no further questions.

Counsel to Witness:

Q. Dr. Williston, I am handing you a copy of an exhibit which has just been introduced, Exhibit 1, which is a letter from Joseph H. Namkung to Johsel Namkung, and the letter is self-explanatory. I wonder if you would read it, please.

(Witness reads Exhibit 1.)

A. I should certainly say that the family is the target of the charge, and it is obvious that they are bewildered and hurt by the charge against Joe.

Q. I call your attention to the third from the last paragraph where Joseph Namkung states, "Unless you are repentant of your past mistake and make a public announcement to the society of your pledge not to retake the same path you have been in, your future will be nothing but dreadful one. And not only you but all the brothers in the family, though not in your way of thinking, will fall into the same fate."

A. I think that bears out, certainly. This practice has been a historic part of the criminal proceeding in Korea. It's terrible, but true.

Q. Is it not true that Syngman Rhee did not re-

Exhibit A—(Continued)

lease a good many North Koreans? A. Yes.

Q. Is it not true that he released a few, if any, Chinese prisoners?

A. I wasn't aware that any Chinese were released. I was not aware of that.

By Examining Officer:

Witness is excused.

(Witness excused.)

Counsel to Respondent:

Q. Mr. Namkung, I wonder if you would care to make a statement to Mr. Needham of why you feel that neither you nor your family at this time should be deported to South Korea?

By Examining Officer:

Q. Will the respondent confine his statement to matters that have not been included in the [18] record.

By Respondent:

Dr. Rhee's attitude toward Communism is needless to say at this moment because it is too well known to the people of the world. He seems almost to be born to crush Communism. I don't have any objection to his desire to crush Communism. However, his brutal tactics of suppressing Communists and their sympathizers and suspects, as well as his political opponents, are also very well known facts

Exhibit A—(Continued)

to the people. The leaders of Korean national police have been Rhee's followers. They comprise of former police officers under Japanese domination. They were enemies of Korean people. When the Second World War was terminated, North Korea persecuted or detained or deported all the police officers who collaborated with the Japanese Government. However, in South Korea, the situation was opposite. Syngman Rhee not only encouraged them to stay in their former position but also gave them the most responsible positions, thus they naturally became followers of Syngman Rhee. Without Syngman Rhee's protection, they would be persecuted by the people, and they are always willing to co-operate with Syngman Rhee's orders. South Korea has been constantly undergoing purges of military personnel as well as civilian officials, without mentioning general public. Rhee detains or executes people who are Communists, pro-Communistic, neutrals, and those who do not agree with his ideas. Anyone who is not desirable to him is alleged to be a Communist, and that means he is subject to persecution. I believe I am known as a person having been affiliated with Communist Party and worked for the cause of Communist Party. If I were to be deported, together with my family to South Korea, I am a person condemned by the United States Government, without protection from any government, and is solely subject to the mercy of South Korean Government. I strongly believe there is very little chance that I could survive. What I really fear for is not the fate

Exhibit A—(Continued)

of myself only, but the fate of my direct family and also that of my folks in Korea and in Japan, too.

Counsel to Respondent:

Q. Mr. Namkung, would you submit yourself to whatever and future screening that might be suggested by the United States Government concerning your loyalty?

A. I am willing and always available for the screening.

Q. And you also have been and are willing to assist the United States Government in any way you can? A. Yes.

Counsel to Examining Officer:

That's all I have, Mr. Needham.

Examining Officer to Respondent:

Q. Do you consider that your immediate family or relations now in Korea would also suffer persecution if you were deported there?

A. It may or may not, and probably some of them, if not all, because one of my brothers had been arrested by the South Korean Government [19] on the alleged charges of having engaged in espionage activities which was proved to be a forgery.

Q. Was he tried and the charges dismissed?

A. I don't hear from him directly, and as far as I know, he has been released on bond. I don't know whether his case has been cleared or not.

Exhibit A—(Continued)

Q. And the charge, you say, is espionage?

A. Yes.

Q. You made the statement that you would support the United States Government to achieve the United Nations' aims in Korea. Just, in what manner have you supported the Government to achieve such aims? Or perhaps you didn't mean exactly that? Isn't it a fact that what you meant by that is that you would give information to certain branches of the Government here on various items of information of interest to the Government, isn't that actually what you meant?

A. Yes, that's correct, and I was trying to think of the occasions that I have supplied information or aided as to achieve the United Nations' objectives in Korea. I cannot recall any specific date or on what specific matters.

Q. To which branch of the Government have you submitted such information?

A. I assume it was Central Intelligence Agency and also to Federal Bureau of Investigation.

Q. Agents of these two agencies have approached you, then, and interviewed you on various matters?

A. Yes, that's correct.

Q. The South Korean Republic has a judicial system, I presume, is that correct? A. Yes.

Q. Is it composed of various courts and judges presiding at these courts? A. Yes.

Q. If, for example, you commit a robbery in

Exhibit A—(Continued)

Korea, are you arrested and brought before one of these courts?

A. Well, all I know is the police will arrest him and put him in the cell and start torturing him to get the confession.

Q. If he confesses, is he brought before a court?

A. Yes.

Q. Is he permitted a jury trial?

A. There is no jury system in Korea.

Q. The judge himself will decide whether the prisoner is guilty or innocent?

A. That's right, yes. [20]

Q. Does the judge assess the fine for the victim?

A. Yes.

Examining Officer to Counsel:

I don't have any further questions; does the Counsel?

By Counsel:

I wish to state for the record my appreciation for this hearing and the appreciation of Mr. Namkung for being able to come here and present, by live testimony, by affidavit, by newspaper report, and by his own statements, his reasons for his belief that he and his family will suffer persecution if he is deported to South Korea.

Examining Officer to Respondent:

Q. Does the respondent have any further statement to make or further evidence to offier?

Exhibit A—(Continued)

A. No, not at the moment, but if I happen to get further information, I would bring it over to you, Mr. Needham.

By Examining Officer:

If further information is submitted before the completed hearing is forwarded to the Central Office of this Service, it will be included as part of the papers and will be considered in the final decision.

Transcript of shorthand notes taken by me on December 2, 1953.

/s/ MARI OHARA. [21]

Exhibit A—(Continued)

United States Department of Justice
Immigration and Naturalization Service
Seattle District

December 14, 1953.

File: A6 795 007

In re: Johsel Namkung

Proceedings Under 8 CFR 243.3(b)

In Behalf of Respondent: Kenneth A. MacDonald,
Attorney at Law,
602 New World Life
Building,
Seattle 4, Washington.

Application:

Stay of deportation on the grounds of claim, persecution.

Discussion:

The record relates to a 33-year-old male, a native and citizen of Korea, who last entered the United States at Seattle, Washington, via Anchorage, Alaska, March 10, 1949, and was admitted pursuant to Section 4(d) of the Immigration Act of 1924. This respondent first entered the United States October 27, 1947, at Seattle, Washington, under Section 4(e) of the Immigration Act of 1924. Subsequent to the respondent's last entry, he was arrested on July 25, 1952, on the charge that he was a

Exhibit A—(Continued)

member of the Communist Party prior to, and the time of, and after entry. At the termination of the warrant hearing, September 4, 1952, the hearing officer found the respondent subject to deportation on the lodged charge that he was affiliated with the Communist Party at the time of entry. The hearing officer ordered his deportation from the United States. A warrant of deportation dated April 8, 1953, is now outstanding.

In pursuance to respondent's application now under consideration, he appeared for a hearing December 2, 1953, represented by counsel. Respondent testified that he believe he would be persecuted if he were deported to Korea bcause he had, in the past, on various occasions, indicated his strong opposition to Syngman Rhee, the South Korean president. Respondent submitted newspaper clippings, a translation of a letter he purports to have received from a brother in Japan, and a witness to support his contention of persecution. The newspaper reports he quotes are concerned with actions the South Korean government has allegedly taken in connection with prisoners of war under control of the Allies. The translation of the letter, allegedly received from respondent's brother (Exhibit "A") indicates that the respondent's family in Korea and Japan apparently fear loss of social status, unless respondent renounced his "red" philosophy.

The Witness, Dr. Frank Williston, testified he was a professor in the Far Eastern Division of the

Exhibit A—(Continued)

University of Washington and that he was familiar with Far Eastern conditions. He stated he had returned from a 2-month trip to Korea in 1953. Dr. Williston testified that his knowledge of present-day conditions in Korea relating to politics was based on current newspaper reports and especially on reports by the New York Times and the Christian Science Monitor. He stated that, in his opinion, if the respondent were deported to Korea, he might suffer persecution, the extent of which he did not know. Dr. Williston pointed out that, in the Inchon landing under General MacArthur, the South Korean military and civil authorities had executed many captured North Korean soldiers on the grounds of their affiliation with the Communists. When questioned in regard to the basis for his opinion of possible persecution to the respondent if he were deported, Dr. Williston admitted that his opinion was based upon current newspaper reports emanating from Korea. Dr. Williston was further questioned in regard to his opinion of Syngman Rhee's act in releasing thousands of North Korean Communist prisoners and the report that he had inducted many of such prisoners into his own army. Dr. Williston stated that he believed many of these released prisoners had been forced into the North Korean armies and never had been Communists.

From the testimony of respondent and the evidence presented, it does not appear that he has

Exhibit A—(Continued)

produced any evidence that would form the basis of a conclusion that he would be persecuted if deported to Korea. He has testified that he has a brother in Korea who was arrested for alleged espionage activity by the South Korean government. He testified that the brother was arrested and released on bond, and he does not know whether his case has been completed or not. He testified that the judicial system in Korea consisted of courts, a judge in each court, but no jury system. However, it appears that if his brother, charged with espionage, can be arrested and then released on bond, no actual summary execution is taking place in Korea of Communists or alleged Communists as respondent maintains. It also appears that Syngman Rhee's action in releasing thousands of North Korean prisoners and reportedly inducting them into his own army indicates that he is not persecuting former Communists. Inasmuch as respondent in 1950 was a courier for the Communist group here and carried a laudatory letter to Korea, addressed to a high North Korean official, it appears that his claim, fear of persecution, may actually be a fear of prosecution for a possible criminal act.

The respondent has a wife and two children. His wife is a citizen of Japan; the children are citizens of Korea. Neither the wife nor children have a permanent status in the United States. Respondent alleges that his wife and children also might suffer persecution if returned to Korea. However, he has

Exhibit A—(Continued)

presented no evidence to substantiate such assertion.

Recommendation:

It is recommended that respondent's application for stay of deportation be denied.

/s/ ROBERT L. NEEDHAM,
Deportation Examiner (Examining.)

EXHIBIT No. 2

Statement

The undersigned, Johsel Namkung (file No. A6 795 007), was ordered deported by David S. Caldwell, Special Inquiry Officer, on the 19th day of February, 1953, on the ground that the undersigned was affiliated with the Communist Party at the time of his entry into the United States on March 10, 1949. The undersigned failed at the time of his hearing to specify any country to which he wishes to be deported, although there is testimony in the transcript of my hearing concerning my fear of being deported to South Korea. The undersigned has been requested by Cecil F. Vehulek, Acting Chief, Detention and Deportation Section, to prepare a statement of why I fear deportation to South Korea.

The undersigned is absolutely convinced that the amount of hatred and violence of the South Koreans for the North Koreans, resulting from acts and

Exhibit No. 2—(Continued)

tensions in that divided country arising long before the outbreak of open warfare between the two sections of the country, and heightened by the tremendous destruction, loss of life and unbelievable misery of people on both sides of the 38th Parallel, make it certain that one deported from this country to South Korea on charges of affiliating with the Communist Party would suffer probable injury and death in South Korea.

This conclusion is based not only upon my knowledge of the bitterness existing between the Korean people but upon quotations from reliable sources which I include herewith and submit to you in support of my contention that my deportation to South Korea at this time will result in serious consequences to my entire family and to myself.

I am opposed to the terroristic methods of the Communist State—to its state police, absolute thought control, to its insistence on complete conformity, and particularly to its conspiratorial desire to subjugate people who aspire for real freedom whether they be Koreans, Chinese or Americans. However, my opposition to this grave danger does not lessen my opposition to the government and policies of Syngman Rhee. This is my country which he has in part destroyed by his methods—methods of the dictator—methods which destroy human dignity and life of my people. I have long opposed in public the methods and aspirations of Mr. Rhee. I have done this in Korea and I am not in a position, nor do I desire to retract my stand on the

Exhibit No. 2—(Continued)

devastation which he has in part brought upon my country. Please remember that he is in absolute control of South Korea and please remember, too, that the following quotations concerning him and his government are from responsible reporters; from men who have grave fears about Mr. Rhee's government and methods. To force my family and myself into this state without protection is, I submit, the signing of the death warrant of my two children, my wife and myself. This is contrary to the terms of the present immigration act, and this statement and plea is made to request the Attorney General to use his discretion to prevent such a deportation. The material presented below concerns the extent of corruption, police power and abuses which have been existent in Korea and which are still true to a large extent. These tensions do not evaporate over night, nor will they with the signing of an armistice. These oppressions and wrongs by both sides in Korea as brought about by centuries of division in the country without hope and without the responsibility of freedom and respect for individual rights or safety, simply do not eradicate upon the signing of a paper. These are grave historical hates which we hope may one day be resolved, but such is at best a hope, though a hope, I pray to God to bring about.

I set forth below quotations concerning recent conditions in Korea and bearing upon the situation of my family should we be deported there. They are set forth under headings concerning Mr. Rhee's rise

Exhibit No. 2—(Continued)

to power, how the country is governed and police methods used in the country.

I. How Mr. Rhee became the President of R.O.K.

"In Korea the United States created a government whose ideals are much closer to fascism than democracy. This was not done entirely wilfully. The American occupation authorities would have preferred a more moderate rightist than Dr. Rhee. But they permitted the development of conditions which made Dr. Rhee's emergence inevitable. To combat communism and stop the advance of Soviet influence, the Americans allied themselves with anti-Communists who have used all the totalitarian techniques of police terrorism, torture, and suppression of liberties for which Americans are wont to condemn communism. The United States wanted a conservative, anti-Communist state but spawned a rightist police-state." Andrew Roth, Korea's Impending Explosion, Nation, 169, 7, August 13, 1949, page 153.

"Rhee's well-known hostility to Soviet Russia made him the logical favorite of the American Army authorities for heading up a Korean regime. For a number of reasons, however, Rhee was unable to occupy the preferred position immediately. Many Americans objected to his reactionary methods. Then the heightening tension between the north and south brought the United States into Rhee's camp. Rhee was recognized as the rallying point of a strong regime which would be 'safe' against Communist infiltration." George N. McCune, Korea Today, pages 244 and 245.

Exhibit No. 2—(Continued)

"President Rhee has forfeited his right to continue as head of the Republic of Korea. Dr. Rhee has jailed and hounded into hiding the majority of the National Assembly. The reappearence of terrorist groups which break up meetings of the president's opponents and organize mobs to intimidate the National Assembly proves the Rhee regime is politically bankrupt." Christian Century. LXIX, 28. July 9, 1952, page 795.

"Dr. Rhee's personally loyal 60,000-man police force and his penchant for jailing critics of his government's corruption have aroused strong opposition to his re-election. Last week, Dr. Rhee took steps to see that he would remain President. First, he declared a state of martial law. Next, he had his police jail 11 National Assembly members whom he accused of being involved in a Communist plot * * *" Time. LIX, 23, June 9, 1952, page 25.

"Lee (Eum Suk) had been so effective in riding herd on the South Korean Assembly, mobbing the Assembly with young hoodlums and arresting some of its members, that he came out of the battle with too much power to suit Rhee. Since Lee posed a threat, Rhee kicked him out of the Home Ministry and had police, block leaders and village elders pass the word to voters that Rhee's favorite for the vice-presidency was not Lee * * *" Time, LX, 7, August 18, 1952, page 24.

II. How Mr. Rhee runs the Country.

"* * * in 1946 when * * * he (Sygman Rhee) set up his blatantly dictatorial rule, maintained by Jap-

Exhibit No. 2—(Continued)

anese-trained police and his own terrorists, arresting potential opponents, outlawing independent political associations, bestowing benefits—land and concessions and jobs—on his faithful henchman * * *. What with the people he had thrown into jail and those who had been killed and those who were in hiding or had fled to the north, he was in a position to elect a National Assembly which chose his President by a handsome majority. Those elections were well cooked. But by 1950 the United Nations was on hand to supervise that year's voting, and while it was still distorted by government repression and corruption, the tide turned sharply against the President and from that date to this the anti-Rhee forces in the Assembly have been in a majority." Freda Kirchway, "Six Years Too Late," Nation, 174, 23, June 7, 1952, page 541.

"Regarding the political situation inside Korea, one of the facts which must not be forgotten is that the invasion of June 25, 1950, came hard on the heels of the election of a National Assembly for the Republic of Korea which was a stunning defeat for President Syngman Rhee. Although the traditional Korean tendency to split into factions returned a parliament in which so many parties were represented, and so many independent deputies seated, that no coherent pattern emerged, one fact was plain—a heavy majority of the members were against the government of President Rhee.

" * * * on November 13 (1950) * * * (the National Assembly) overrode two presidential vetoes and

Exhibit No. 2—(Continued)

passed bills which virtually take out of the executive's hands the activities of the police in proceeding against suspected collaborators and also forbid nationalist (i.e., Rhee) bodies to apprehend, seize, detain, interrogate or punish suspects without recourse to an 11-man commission which the Assembly will form. By thus overriding the presidential veto, the Korean congress * * * revealed that it suspects him of being ready to launch—or at least permit—a reign of terror against civilians." Christian Century, LXVII, 4g, November 29, 1950, pages 1414-15.

"Here, briefly, is what the South Korean parliament's investigation showed, as reported by the United Press in a dispatch which appeared in the New York Times on June 13, and presumably in other papers subscribing to that press service. A committee of the National Assembly headed by Suh Min-ho, chairman of its interior affairs and national security committee, reported that 50,000 draftees had died of starvation or disease in Republic of Korea training camps since December. During a forced march of three weeks' duration on their way to the camps, approximately 300,000 men deserted or died along the way * * *. Of the draftees still in training camps, the investigating committee reported that 80 per cent are 'physical wrecks, incapable of labor.'

"The National Assembly's committee placed the responsibility on 'profiteering' by 'corrupt officers' of the Korean forces. It said that more than 2 mil-

Exhibit No. 2—(Continued)

lion dollars appropriated for the training program had disappeared, and intimated that it had landed in the pockets of national guard officers * * * the fact that an atrocity of this kind could go on, building up for months until 80 per cent were physical wrecks, shows an utter incapacity (of Rhee's government) to discharge the responsibilities of office." Christian Century, LXVIII, 27, July 4, 1951, page 790.

"As for the corruption of army officers and government officials, the Koreans superceded the Chinese and Japanese. Brig. Gen. Kim Yun-gun, son-in-law of Defense Minister Sin Song-mo and a professional wrestler before he was picked up by the President to become a general, pilferred 2-hap of rice out of every 6-hap which was allocated for a day's ration for servicemen and embezzled 15 billion Won by usurping the material for uniform for 2,000 soldiers. Sin Song-mo, while he was Defense Minister, ordered the secret burial of 170 corpse, the result of massacre (by the South Korean Army on suspicion of collaboration with Red guerrila) in Kochang, South Kyongsang Province, and falsified the order of operation as well as forging the report on the incident. Furthermore, he ordered his underlings to clad in Red uniform and ambush the Joint Investigation Party dispatched by the National Assembly on the way to the spot in order to stall the investigation, but the conspiracy had been revealed before it was materialized." Sawaichiro Kamata, A

Exhibit No. 2—(Continued)

Woe of the Korean People, Kaizo, Vol 33, July, 1952, page 89.

III. Police.

"The most important cause of criticism of the South Korean Interim Government had been the activities of the police and suppression of civil liberties." McCune, Korea Today, page 241.

"Foreign Minister Chang Taiksang * * * had been the chief of the Seoul metropolitan police under the South Korean Interim Government * * * was often the object of bitter criticism * * * because of the brutal and terroristic methods of his police force." Ibid., page 239.

"The national police administration which we foster is run by anti-Communists, terrorists of the right, and police officers trained largely in Japanese methods. The latter still operate under Japanese law.

"Of course, leftists—like rightists—are guilty of terrorism. Of course, there has been violence in strikes. Of course, the police have been attacked. But such truths do not warrant this wholesale policy of suppression; a suppression which forces many non-Communists to flee to the North in desperation, which causes liberal political leaders to find new quarters every night for fear of the police or of gangs, and which caused the chairman of the legislature, an American appointee, to retire to the

Exhibit No. 2—(Continued)

United States hospital, 10 miles out in the country, because he was 'politically ill.' I found him there, having his temperature taken, and I would not be surprised if it were high, considering the risks he said he ran. And this man damned by the right as a Communist, is a staunch middle-of-the-roader, a Princeton graduate, and chairman of the abortive Coalition Committee selected by the Military Government itself.

"Only extremes are tolerated in Korea. You are either pro-Soviet or rightist. If you happen, actually, to be a liberal, if you feel that the pro-Japanese collaborators must be purged, that the police must be removed from politics, that unions should have freedom to strike, and that Northern and Southern Korea must be reconciled—then you are a Communist." Roger N. Baldwin, Our Blunder in Korea, Nation, 165, 5, August 2, 1947, page 120.

"Much of the evidence against these collaborators (with the Japanese) has been collected by the National Assembly's 'Special Committee on National Traitors,' using its own police because the regular police force is filled with collaborators. Early in June the headquarters of the anti-quisling agency was raided by the regular police, who seized documents and arrested the special police. When the committee's chairman tried to stop them he was told, 'We do this on the personal orders of President Rhee.' Afterward, the police were forced to set free the 22 prisoners they had taken on this raid. Sixteen of

Exhibit No. 2—(Continued)

them had broken ribs, skull injuries, or broken eardrums." Andrew Roth, Korea's Impending Explosion, Nation, 169, 7, August 13, 1949, page 152.

"A Korean national, named Kim Po-song, was arrested on account of espionage and tried by a military court, but was released later because of insufficient evidence. He was found guilty, however, by the Japanese Immigration authorities for having violated the Alien Registration Act and was deported to South Korea, where he was executed later." Chuokoron, Vol. 67, September, 1952, page 73.

"Government forces displayed a brutal vengeance in handling prisoners and suspected dissident elements (when the Yosu rebellion was suppressed). While attributing the revolt to Communist leadership and inspiration, informed parties acknowledged privately that police brutality and repression had attracted many followers to the rebels." McCune, Korea Today, page 242.

A recent example of the continued tension in Korea and the continued anger of Mr. Rhee is indicated in an Associated Press story from Washington, D. C., dated April 12, 1953, as taken from the Portland Oregonian on April 13, 1953:

"South Korean President Syngman Rhee made an apparent effort to head off any peace plans based on a divided Korea.

" 'Any settlement of the Korean war which leaves us divided will be considered by our people as ap-

Exhibit No. 2—(Continued)

peasement of the Communists,' Rhee declared in a statement radioed to his country's embassy here.

"The South Korean leader urged unification of his nation through 'victory at the Yalu river, our age-old northern boundary.' This, he said, 'will not only be a victory for Korea, the present frontier of freedom, but a victory for the entire free world.'

"It was obvious that Rhee's statement was aimed at published reports on decisions made or under study to divide Korea at its narrow waist—some 80 to 100 miles north of the present battleline, for it contained this reference:

"'Any settlement, along any broad or narrow waist of our peninsula, will be a victory for agressive communism.'"

Dated at Seattle, Washington, this 15th day of April, 1953.

Respectfully submitted.

JOHSEL NAMKUNG.

State of Washington,
County of King—ss.

On this day personally appeared before me Johsel Namkung, to me known to be the individual described in and who executed the foregoing statement, and acknowledged to me that he signed the same as

Exhibit No. 2—(Continued)

his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and seal this 23rd day of April, 1953.

/s/ KENNETH A. MacDONALD,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT No. 3

U. S. Department of Justice
Board of Immigration Appeals

File No. A-6795 007

In the Matter of:

JOSHEL NAMKUNG.

AFFIDAVIT

State of Washington,
County of King—ss.

Joshel Namkung, being first duly sworn, on oath, deposes and says:

That I have been requested by John P. Boyd, District Director, Immigration and Naturalization Service, 815 Airport Way, Seattle 4, Washington, to submit a formal request for stay of deportation and setting forth in it in detail my reasons for the request and any evidentiary material I have to sup-

Exhibit No. 3—(Continued)

port my claim of persecution in the event of my deportation to Korea.

Accordingly, I hereby request from the Attorney General a stay of deportation from the United States because it is my confirmed belief that my wife, my children and myself will be subjected to physical persecution in the event of our deportation to Korea at this time or in the foreseeable future. I also ask by way of this affidavit for an opportunity to give sworn testimony concerning my fear of persecution in Korea before an officer of the immigration service.

Much of my evidence to be submitted and the statements submitted herewith must be hearsay; I am or not have been in South Korea recently, nor can I produce live witnesses to testify to the facts which I believe to be true. The only thing that I can do is to submit to the immigration service opinions of responsible people who are observing the Korean scene today. These observations certainly demonstrate the lack of respect for human life in Korea today.

There is no writ of habeas corpus in Korea, and, thus if I were taken or imprisoned, there would be no process such as we in the United States have to make certain that I be granted any trial whatever, or that I have any protection from the power of the South Korean government.

The concern of the entire free world over the excesses of Mr. Rhee are now apparent. These excesses

Exhibit No. 3—(Continued)

include the release of war prisoners in outright disregard of his commitments, his intransigence in dealing with Secretary of State Dulles and his emissary, Mr. Walter S. Robertson, Assistant Secretary of State, the physical beating accorded to the only leader opposing Mr. Rhee in South Korea, and lately his determination to march north at a time 90 days after the truce if Korea is not unified by that time under South Korean rule.

I set forth quotes from recent issues of the New York Times in support of the foregoing facts:

1. Senator Alexander Wiley of Wisconsin and the leader of the Eisenhower Administration's foreign policy positions recently said:

"I want to express the firm view that President Rhee is doing his nation, the UN as a whole and the cause of world peace infinite damage by his continued reckless attitude, * * *" (Senator Wiley) said, "Today, however, he has carried his views to such an illogical extreme as to jeopardize the efforts of the free world to protect his country. President Rhee in his patriotic zeal has displayed an unfortunate entremism, obstinacy and arbitrariness which have caused infinite grief to the parents of every boy in the UN forces serving alongside the South Korean divisions."

If the present situation deteriorates to its most dangerous potentialities, the lives of 300,000 American boys in South Korea will be directly endangered.

Exhibit No. 3—(Continued)

"Wiley Calls Rhee Reckless Man Who Imperils the Cause of Peace." The N. Y. Times. Jl. 8, 3:3.

2. General news reactions indicative to Mr. Rhee's irresponsibility and aggressiveness follow:

"The South Korean move was generally viewed as a desperate effort by the Rhee government to torpedo the negotiations on the virtual eve of a truce signing and force a continuation of the fighting." N. Y. Times. Je. 18, 53, 1:7.

Walter S. Robertson, Assistant Secretary of State: "Mr. Robertson was infuriated at the apparent breach of agreement, particularly since it could lead the Communists to believe that the UN command was not signing an armistice in good faith. A strong protest was made to Dr. Rhee." N. Y. Times. Jl. 13, 3:1.

Dag Hammarskjold, the Secretary General's careful warning came next: "It is a curious sight, indeed, when a victim of aggression voices intentions which might themselves call for repression in the name of those very principles which have given him protection when he was attacked. * * *" "U. N. Weighs Steps if Truce Is Broken." N. Y. Times. Jl. 11, 3:1.

3. News reactions to the beating and subsequent arrest of Chough Pyung Ok follow:

"Rhee Challenger Is Beaten in Seoul. A political opponent of President S. Rhee was beaten early today shortly after a mob of about 500 South

Exhibit No. 3—(Continued)

Koreans ransacked his home and destroyed its fixtures.

"Six unidentified assailants found Dr. Chough Pyung in hiding after the angry crowd stormed his residence. Mr. Chough, former Home Minister and a defeated Vice-Presidential candidate, was beaten severely on the head.

"Only a few hours before his home was attacked last night, he spoke out bluntly against Dr. Rhee's arbitrary policies regarding a Korean armistice.

"He told a news conference Dr. Rhee's 'unilateral action' last week in ordering the release of more than 27,000 anti-communist Korean war prisoners was 'unwise' and might isolate South Korea from the free world.

"Mr. Chough, a leader in the opposition Democratic Nationalist party, expressed belief the prisoners should have been freed one or two years ago—not after Allied or Communist truce teams had agreed upon their disposition.

"After storming into Mr. Chough's home, the crowd took away the furniture and proceeded to the residence of his aide, Ko Hung Moon. Mr. Ko also was beaten and his house ransacked.

"Mr. Chough served as South Korea's Ambassador at Large to the United Nation's General Assembly in Paris in 1948 as a Korean observer. Dr. Rhee removed him as Home Minister in 1950.

"His party, made up primarily of bankers, landowners and businessmen, is the strongest opposition group in the republic." N. Y. Times. Jl. 24, 3:4.

Exhibit No. 3—(Continued)

"South Koreans Calm Down, Avoid All Demonstrations. By Greg MacGregor."

"The recent arrest of Chough Pyung Ok, former Home Minister and current leader of the strongest opposition party, the Democratic Nationalists, has done little to increase President Rhee's popularity.

"Mr. Chough, 59-year-old member of the National Assembly, was seized, beaten and then jailed for daring to speak in favor of the UN and against the particular process of unification that President demanded. Also, Mr. Chough dared to criticize President Rhee for ordering the release of the 27,000 Anti-Communist prisoners of war.

"Mr. Chough will be tried shortly under the national security code, along with three of his supporters. If he is found guilty, a death penalty could be imposed." N. Y. Times. Jl. 19, IV, 5:6.

"The South Korean National Police today released Chough Pyung Ok, opposition political leader, who publicly criticized President Syngman Rhee's release of 27,000 Anti-Communist war prisoners.

"The government prosecutor's office said Mr. Chough was released on parole but that he still was being investigated. He had been charged with violating the National Security Law and had been indicted.

"Mr. Chough had said that Dr. Rhee's release of the war prisoners, which almost wrecked the Korean armistice talks, was 'unwise.' Shortly afterward, he

Exhibit No. 3—(Continued)

was beaten up by a young pro-Rhee group. He was jailed last month.

"Meanwhile, President Rhee's Liberal Party, with a heavy majority of votes in the N. A., passed a resolution branding as 'traitors' the men who opposed the President's policy of resisting an armistice. It recommended that opposition leaders, Chough Pyung and former justice, Min Kim Choon Yun, be exiled from the country." N. Y. Times. Jl. 25, 3:4.

"The government refused to confirm or deny his (Chough's) arrest until this morning, when Dr. Karl Hong Ki, director of information, issued this statement: 'Despite Chough's being on probation on an indictment, he indiscriminately misled the public by words and deeds, resulting in a very, very difficult situation in public peace and inviting national indignation. Thereby, he endangered his own life and requires special protection. The organization which now detains Mr. Chough will in due course give the public an explanation on the matter.'" N. Y. Times. Jl. 27, 2:6.

"Rhee Counts on Koreans to Back Him in Crisis. By Greg MacGregor."

"Although the South Korean government structure is democratic in form, there are many who might term it a police state under the conditions that exist today. It is obviously unhealthy to criticize the president publicly. The opposition leader—Chough Pyung Ok, secretary general of the National Democratic party—found this out last week

Exhibit No. 3—(Continued)

after he had condemned the Chief Executive for freeing the Anti-Communist war prisoners and had urged that the UN armistice terms be accepted.

"Shortly after holding his press conference, Mr. Chough, who controls thirty out of the 183 seats in the National Assembly, claimed that he was misquoted. The damage had been done, however, and that night Mr. Chough received some tough and unwelcome visitors in his home. He is hoping to be up and around again toward the latter part of this week." N. Y. Times. Je. 28, IV, 3:4.

4. Mr. Rhee is currently undertaking a renewed drive against alleged subversives:

"Rhee Drives to End Fraud, Subversion. Editor Held on Spying Charge—3 Army Officers on Trial—Youth Units Dissolved."

"President Syngman Rhee is waging a campaign to rid the Republic of Korea Government of corruption and suspected subversives.

"In addition, Dr. Rhee has ordered the South Korean Army's counter-intelligence corps to investigate and arrest Koreans suspected of engaging in Communist espionage or Anti-Government activities. The corps arrested a well-known South Korean newsman, Chung Kook Eun, on charges of spying, and he has been undergoing severe interrogations since he was taken into custody Aug. 31.

"Three high-ranking officers of the South Korean Army, including the former chief of the Army In-

Exhibit No. 3—(Continued).

telligence Bureau, Brig. Gen. Kim Chong Pyung, are being tried by the highest military court at Taegu on charges of having violated the National Defense Law.

"The National Police have arrested their former assistant director, Kim Eang Bong, on charges of having plotted against the government. The police alleged that he had formed an 'unauthorized' group, with more than 1,300 members, in an attempt to 'overthrow the Government.'" N. Y. Times. September 13, 1953, 3:6. (Emphasis supplied.)

5. Mr. Rhee's still continuing desire to forcefully bring about the unification of his country and his desire to wage war if necessary to that end is explained in a long article attached hereto from the New York Times for Sunday, October 4, 1953. The article is by William J. Jorden and is entitled, "Rhee's Korea Feels Sure Foe Doesn't Want Peace."

Conclusion

If Syngman Rhee treats trusted former allies and trusted officials in the manner indicated above, how will he treat a person who has been found in the United States to be affiliated with a subversive organization and deported for that reason?

It is clear to me that my wife, my family and myself would immediately be arrested and persecuted. I doubt that we would even be arrested; I suggest that under today's conditions in Korea that

Exhibit No. 3—(Continued)

my family would simply disappear or be found dead.

/s/ JOHSEL NAMKUNG.

Subscribed and Sworn to before me this 27th day of October, 1953.

[Seal] /s/ FRANCIS HOAGUE,
Notary Public in and for the State of Washington, Residing at Seattle.

EXHIBIT B

(Copy)

Form W-4a.
Immigration and Naturalization.

United States of America
Department of Justice

Immigration and Naturalization Service

WARRANT OF DEPORTATION

No. A 6,795,007.

To: Chief, Detention and Deportation Section, Immigration and Naturalization Service, Seattle, Washington.

Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized officer of the United States Immigration and

Exhibit B—(Continued)

Naturalization Service, and upon the basis thereof, an order has been duly made that the alien, Johsel Namkung, who entered the United States at Seattle, Washington, on the 10th day of March, 1949, is subject to deportation under the following provisions of the laws of the United States, to wit: Section 241(a) of the Immigration and Nationality Act, in that he was, at the time of entry, a member of the following class of aliens excludable by the Act of October 16, 1918, as amended: An alien who was affiliated with the Communist Party of the United States.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to take into custody and deport the said alien pursuant to law, at the expenses of the appropriate "General Expenses, Immigration and Naturalization Service, 1953," including the expenses of an attendant if necessary.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 8th day of April, 1953, at Seattle, Washington.

/s/ JOHN P. BOYD,
District Director,
Seattle District.

EXHIBIT C

(Copy)

A6 795 007
December 14, 1953.

Assistant Commissioner, Border Patrol, Detention and Deportation Division, Central Office,

John P. Boyd, District Director,
Seattle, Washington.

Johsel Namkung, your September 28, 1953.

In accordance with your subject communication, herewith is recommendation of the examining officer and record of interview with attached exhibits.

/s/ JOHN P. BOYD.

Enclosures
RLN:mo

EXHIBIT D

(Copy)

A6 795 007
January 5, 1954.

Assistant Commissioner, Border Patrol, Detention and Deportation Division,

John P. Boyd, District Director,
Seattle, Washington.

Johsel Namkung, Your September 28, 1953.

In connection with your subject communication, reference is made to record of interview, attached

Exhibit D—(Continued)

exhibits and recommendation of the examining officer in subject case forwarded to the Central Office on December 14, 1953.

Since these documents were forwarded for review, this office has received from the Korean Consulate General, San Francisco, California, a letter which appears to be pertinent to the issues involved. Copy of such letter is attached for your information.

/s/ JOHN P. BOYD.

Attachment
RLN:mo

Korean Consulate General
San Francisco, California

December 29, 1953.

Dear Mr. Boyd:

Ref: Johsel Namkung—A6-795-007.

Mr. Namkung's fear of persecution by the Government of the Republic of Korea is without foundation. It is true that our Government has abolished the Communist Party as a political party because of their subversive activities against the people and the Government of Korea under the direction of Moscow.

Any former Communist party member who really turned away from this traitorous organization and returns to the ranks of freedom loving people of

Exhibit D—(Continued)

the world, he has nothing to fear because our Government forgives all those who renounced the red doctrine.

Mr. Namkung confided to this writer in January, 1952, that he is no longer a member of the Communist party after he learned that his father, Rev. Namkung Hyuk, a Presbyterian Minister in Seoul, was carried away by the fiendish red hordes into northern Korea when our armed forces dealt them a stunning blow in the fall of 1950.

The Korean Government always welcomes home with open arms all those Prodigal Sons who truly repented and return home for mercy and guidance.

I hope this will assist you in carrying out justice.

Sincerely yours,

/s/ YOUNG HAN CHOO,
Consul General.

Mr. John P. Boyd,
District Director,
U. S. Department of Justice,
Immigration & Naturalization Service,
815 Airport Way,
Seattle 4, Washington.

EXHIBIT E

(Copy)

Standard Form No. 64.

Office Memorandum

United States Government

A-6795007

February 15, 1954.

To: District Director,
Seattle, Washington.

From: W. F. Kelly, Assistant Commissioner,
Border Patrol, Detention and Deportation Division.

Subject: Johsel Namkung—A-6795007—Claim of physical persecution.

After careful consideration of the material the alien has submitted and of his own testimony in support of his claim that he would be subject to physical persecution if deported to Korea, it is not my opinion that the alien would be subject to physical persecution if deported to that country.

You should proceed, therefore, to execute the outstanding warrant of deportation in this case.

/s/ W. F. KELLY.

Via Air Mail.

[Endorsed]: Filed April 2, 1954.

[Title of District Court and Cause.]

AMENDED RETURN

John W. Keane states that he is an attorney with the United States Immigration and Naturalization Service; that in his official capacity he is authorized to make in behalf of John P. Boyd, District Director and respondent herein, the following amended return.

Allegation No. V as amended to read as follows:

There is attached and made a part of this return, identified as Exhibit A, a transcript of the interview accorded the petitioner December 2, 1953, on his application for a stay of deportation, together with Exhibits No. 1 through 5, inclusive.

/s/ JOHN W. KEANE,

Attorney for the Respondent, John P. Boyd, District Director, Immigration & Naturalization Service, Seattle.

I hereby certify that a copy hereof was served by mail on MacDonald, Hoague and Bayless, Attorneys at Law, 602 New World Life Building, Seattle, Washington.

Dated April 13, 1954.

/s/ JOHN W. KEANE.

EXHIBIT A

United States of America
Department of Justice
Immigration and Naturalization Service
Seattle, Washington

April 13, 1954.

Certification

By Virtue of the authority vested in me by Title 8, Code of Federal Regulations, Section 2.1, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I hereby Certify that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to Johsel Namkung, File No. A-6 795 007, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ L. W. WILLIAMS,
Acting District Director, Immigration and Naturalization Service, Seattle District.

EXHIBIT No. 1

Joseph H. Namkung,
417 Kishimoto Bldg.,
Marunouchi, Tokyo,
Japan.

October 20, 1953.

Johsel Namkung,
2017-18th Ave. So.,
Seattle, Washington,
U.S.A.

To Johsel:

I am writing this letter to you especially because I was so humiliated at the Ministry of Foreign Affairs when I visited Seoul on business recently. [An official] of the Ministry told me that you had been engaged in the "red" activities even before the June 25th Incident [the Korean War] had occurred, and since the United States Government had decided to deport you [from the U. S.] they had come a decision to revoke your passport, and he even showed me your passport.

[The folks] in Korea, as well as I, are startled of the implication. The reputation of the Namkung family in Korea is gravely impaired by this.

Don't you care whether your father is taken prisoner by those villains? Why do you have to share the idea of those thieves?

It is too obvious that you cannot be a red and

Exhibit No. 1—(Continued)

they would never accept you as one. You should see the facts of purges taking place inside the North Korea.

Why on earth do a sensible fellow as you have to take such a foolish path? If you insist upon going that way, there is no other way than severing the brotherhood between us. Unless you are repentant of your past mistake and make a public announcement to the society of your pledge not to retake the same path you have been in, your future will be nothing but dreadful one. And not only you but all the brothers in the family, though not in your way [of thinking], will fall into the same fate. It is hard on us to be treated unjustly.

I want to give you a final advice. Should you be a red, though I pray not, please awake and bring yourself to the right course, and make your stand clear. Mother is in tears every day for not having excuse to offer to the society.

I hope to hear a good news from you and wish you would follow the right course at once.

Your Brother.

This is to certify that I, Johsel Namkung, have translated the letter in Korean attached hereto, and that my translation into English is accurate.

/s/ JOHSEL NAMKUNG.

Exhibit No. 1—(Continued)

Subscribed and sworn to before me this 2nd day of December, 1953.

[Seal] /s/ KENNETH A. MacDONALD,
Notary Public in and for the State of Washington.
Residing at Seattle.

[Envelope]

[Cancelled Stamps and Postmark]

Joseph H. Namkung,
417 Kishimoto Bldg.,
Marunouchi,
Tokyo, Japan.

Mr. Johsel Namkung,
2017-18th Ave. So.,
Seattle, Wash.,
U. S. A.

Via Air Mail

EXHIBIT No. 4

Rhee Reaffirms R. O. K. Will
Fight if Nation Isn't Unified

The Seattle Daily Times

Seattle, Washington, Wednesday, November 4, 1953

Resumption of
War Hinges on
Peace Talks,
Say R. O. K.

By GEORGE McARTHUR
Associated Press Foreign Staff

SEOUL, Nov. 4.—President Rhee today reaffirmed his decisions to drive the Communists out of North Korea if a postarmistice political conference fails to unify his country—or is not held.

The white-haired South Korean chose this particular time—with preliminary political talks at Panmunjom stalemated—to answer questions submitted to him by the Associated Press weeks ago.

Election Plan Offered

In his written answers Rhee reaffirmed his position and said he favored holding elections in all Korea, once the country is unified.

Rhee advanced a two-part election plan for a unified Korea. Under his plan, his South Korean government would "allow" North Koreans to hold an election of their own under the observation of the U. N.

Exhibit No. 4—(Continued)

"If the free people of North Korea should elect someone other than the President of the Republic of (South) Korea, I would be glad to step aside and let the entire nation (of South and North Korea) held a nation-wide election," Rhee said.

Rhee said he doubts if any questions can be settled peacefully at a postarmistice peace conference.

"In the event the political conference fails, or is never held, the Republic of Korea must act to unify Korea and drive from our soil the Chinese who now are settling in the north with the idea of eventually seizing the whole country," Rhee said.

"In this action we would welcome the support of the United States and the United Nations, but we do not ask them to stay, against their wish, solely for the sake of Korea. If they do not feel now, as they did at the beginning of the war, that the fight for Korea is a fight for themselves, then we do not urge them to do any more fighting in Korea."

Rhee said that at the time of the Korean armistice—July 27—South Korea agreed to postpone its determination to take unilateral action if necessary to drive all Chinese Reds out of Korea.

Deadline—January 28

The 90-day delay set by South Korea presumably is for a period of 90 days after October 28, the day the armistice document calls for convening the peace conference. This would make Rhee's deadline for success of the peace conference January 28.

(Rhee attacked suggestions that India be given a

Exhibit No. 4—(Continued)

limited role in the peace conference as a compromise to Red demands for neutral participation, the United Press reported. "Let India come to the Conference as a Communist state," Rhree said. "But as a neutral, never!")

Rhee criticized Indian troops guarding prisoners who refuse to return home and India itself as "pro-Communist."

EXHIBIT No. 5

The Seattle Times

Thursday, November 5, 1953.

Roks May
Court-Martial
Ex-P. O. W.'s

PUSAN, Korea, Nov. 5.—(AP)—The South Korean government may court-martial 60 R. O. K. soldiers in the prisoner-of-war exchange as "victims of Communist brain-washing," a reliable source said today.

All prisoners returned by the Reds have undergone "intensive screening" on isolated Yongcho Island, the R. O. K.-army source said, and only 60 of 7,848 failed to pass.

The source said the 60 face charges of being "subversive" and their cases will be studied by a court-martial board which will decide whether to try them.

[Endorsed]: Filed April 13, 1954.

[Title of District Court and Cause.]

TRAVERSE

The traverse of the petitioner, Johsel Namkung, by his attorney, Kenneth A. MacDonald, respectfully shows and he alleges:

I.

Petitioner admits and denies the allegations in the Return to the Order to Show Cause as follows:

Allegations I, II, III, IV and V, as amended, found on pages two to four, inclusive, of said Return are admitted, except that petitioner has no information or knowledge of whether or not Exhibits 1, 4 and 5 have been requested from Washington, D. C., and, therefore, denies that allegation.

For answer to the conclusions set forth on pages one and two of said Return, petitioner alleges as follows:

I.

The procedure followed in considering petitioner's application to the Attorney General for a Stay of Deportation was irregular, unfair and not in compliance with the statute, the regulations, or the Constitution of the United States, in that:

1. The decision of the Assistant Commissioner Border Patrol, Detention and Deportation Division, attached to the return as Exhibit E, was based on a recommendation by a subordinate, Robert L. Needham, Deportation Examiner (examining). Robert L. Needham exceeded the authority conferred upon

him by 8 CFR 243.3(b) in that he made an adverse recommendation in regard to petitioner's application for a stay of deportation. The foregoing regulation provides that the decision of the Assistant Commissioner Border Patrol, Detention and Deportation Division shall be based upon evidence; the regulation does not contemplate that the decision shall be affected in any way by the findings and recommendations of a subordinate. The procedure in regard to the application for a stay of deportation was rendered further objectionable by the fact that the subordinate in question, the said Robert L. Needham, had previously and is presently serving in the Immigration and Naturalization Service at the Port of Seattle as an examiner on subversive cases and that he has investigated subversive cases, including the case of petitioner; further, that Robert L. Needham had presented evidence against petitioner at petitioner's deportation hearing held before Special Inquiry Officer David S. Caldwell, decided February 19, 1953; that at the time Robert L. Needham made his adverse recommendation in the proceeding based upon petitioner's request for stay of deportation, there was no evidence in the record upon which Mr. Needham could have based his recommendation.

2. The decision of the Assistant Commissioner as aforesaid was based on evidence introduced into the record of the proceedings after the close of the proceedings before Mr. Needham. Exhibit D, attached to the Amended Return, and consisting of

a letter from the Korean Counsul General in San Francisco, dated December 29, 1953, was not brought to the petitioner's attention until after the Assistant Commissioner had rendered his decision and after the commencement of the habeas corpus proceedings herein. At not any time has petitioner had an opportunity to examine any witnesses concerning the accuracy of the facts and opinions set forth in said letter, or has he had the opportunity to introduce any rebuttal testimony in any proceeding before the Attorney General or his delegates. The late introduction of said letter into the record has prevented the petitioner from seeking a modification or vacation of the Assistant Commissioner's decision in accordance with regulations (8 CFR 6.21a).

3. Petitioner was obliged to bring the instant petition for a Writ of Habeas Corpus in order to compel the Immigration Service to disclose the findings of the Assistant Commission Border Patrol, Detention and Deportation Division; this failure to serve the decision of said Assistant Commissioner upon petitioner was contrary to the regulations (8 CFR 243.3(c)) and prevented petitioner from moving to vacate or modify the decision of the Assistant Commissioner.

II.

The Attorney General delegated improperly the power granted to him to withhold deportation of petitioner in accordance with the governing statute.

It is respectfully urged that petitioner has not been accorded a hearing and review by the Immi-

gration Service in his claim of physical persecution, as required by the governing statute; that the petition herein should be granted, petitioner discharged from custody under the outstanding warrant for deportation, and the cause remanded to the Immigration Service for proceedings in accordance with law.

/s/ KENNETH R. MacDONALD,
Attorney for Petitioner.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 30, 1954.

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by the parties to this action and their respective counsel that the matters set forth below are agreed matters of fact:

(1) That the following colloquy took place between the Special Inquiry Officer and Johsel Namkung during his deportation hearing January 20, 1953, at 815 Airport Way, Seattle, Washington, and the same appears in the written transcript of the hearing at pages 40-41:

"Q. Is there any particular reason why you don't desire to return to Korea?

"A. Yes. It's quite evidence I would be persecuted if I ever get into Korea.

"Q. What do you mean by that, 'It's quite evident'?

"A. The South Korean government is well known as anti-Communist and their ruthless means of suppressing Communists or Communist suspects are well known among the western countries.

"Q. Isn't it true that quite recently, as a matter of fact, former members of the North Koreans who were actually South Koreans, deserted the North Korean army and were welcomed back by the South Koreans and by their families, practically with open arms, for having left the North Korean army and having had a change of heart?

"A. In theory that is correct, but in action it hasn't been exactly in that way.

"Q. You have seen, have you not, some of these magazine articles on that patricular phase? I believe one appeared in a recent issue of Life Magazine, an article and a series of pictures devoted to deserters from the North Korean army?

"A. No, I haven't seen it."

(2) That Cecil F. Vchulek, Chief, Detention and Deportation Section, U. S. Immigration and Naturalization Service, 815 Airport Way, Seattle, Washington, acting for the respondent, did on February 18, 1954, by letter request Johsel Namkung to call at his office for an interview; that on or about February 19, 1954, Johsel Namkung appeared at said office and the said Cecil F. Vchulek did at that time advise Johsel Namkung orally that his application for suspension of deportation upon his claim to physical persecution had been denied by the Assistant Commissioner, Immigration and Naturalization Service, and he was further advised

that arrangements were being made for his deportation.

/s/ F. N. CUSHMAN,
Assistant United States Attorney.

/s/ JOHN W. KEANE,
Attorney, Immigration & Naturalization Service.

/s/ KENNETH A. MacDONALD,
Attorney for Petitioner.

[Endorsed]: Filed June 1, 1954.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3670

THE UNITED STATES OF AMERICA, ex rel. JOHSEL NAMKUNG,

Petitioner,

vs.

District Director of Immigration and Naturalization at the Port of Seattle, State of Washington, JOHN P. BOYD,

Respondent.

ORDER

This matter came before the court for hearing on June 1, 1954, the petitioner appearing by counsel, Kenneth A. MacDonald, and the respondent, the

District Director, being represented by F. N. Cushman, Assistant United States Attorney, and John W. Keane, Attorney, Immigration and Naturalization Service, and evidence having been considered and oral arguments heard, and the court having determined that the proceedings before the Immigration officials upon the petitioner's application for suspension of deportation under 8 USCA 1253(h) were not infected with unfairness such as denied the petitioner due process of law,

Now, Therefore, It Is Ordered, Adjudged, and Decreed that the application of Johsel Namkung for a writ of habeas corpus be and the same is hereby denied and the rule to show cause heretofore issued is discharged.

It Is Further Ordered that deportation of the petitioner be stayed pending appeal to the Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 3rd day of June, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented and approved by:

F. N. CUSHMAN,

By /s/ WILLIAM A. HELSELL,
Assistant United States Attorney.

Approved as to form:

/s/ KENNETH A. MacDONALD,
Attorney for the Petitioner.

[Endorsed]: Filed June 3, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Johsel Namkung, petitioner above named, hereby appeals to the United States Court of Appeals for the 9th Circuit from the final judgment entered in this action on June 3, 1954.

/s/ KENNETH A. MacDONALD,
Attorney for Appellant,
Johsel Namkung.

[Endorsed]: Filed June 3, 1954.

[Title of District Court and Cause.]

DEPOSIT FOR COSTS ON APPEAL

Comes Now, Johsel Namkung, Petitioner-Appellant in the above-entitled action, and deposits with the Clerk of the United States District Court of the Western District of Washington, Northern Division, $200.00 cash in lieu of a surety bond on appeal to the United States Court of Appeals for the Ninth Circuit, to reverse a judgment of June 3, 1954, rendered in the above-entitled action and Court by Judge William J. Lindberg.

This deposit is made and shall be conditioned to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or of such costs

as the appellate court may award if the judgment is modified.

/s/ JOHSEL NAMKUNG,
Petitioner-Appellant.

The foregoing deposit for costs on appeal is hereby approved as to amount this 1st day of July, 1954, and on this day the filing of the foregoing deposit for costs on appeal subsequent to the giving of notice of appeal is consented to.

/s/ WILLIAM J. LINDBERG,
District Judge.

The foregoing deposit for costs on appeal is hereby approved as to amount this 1st day of July, 1954.

/s/ F. N. CUSHMAN,
Assistant United States Attorney, Western District of Washington.

Presented by:

/s/ KENNETH A. MacDONALD,
Attorney for Petitioner-Appellant.

[Endorsed]: Filed July 1, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Johsel Namkung, Petitioner-Appellant, is hereby held and firmly bound unto District Director of Immigration and Naturalization of the Port of Seattle, John P. Boyd, in the sum of two hundred ($200.00) cash lawful money of the United States of America to be paid to the said District Director of Immigration and Naturalization of the Port of Seattle, John P. Boyd, to which payment well and timely to be made, I bind myself, my successors and assigns by these presents.

The Condition of this obligation is such that if the above-named Johsel Namkung shall prosecute this said appeal and shall pay all costs if the appeal is dismissed or the judgment or decision of the United States District Court is affirmed, or such costs as the Appellate Court may award if the judgment and decision of the United States District Court is modified, then this obligation shall be void, otherwise to remain in full force and effect.

/s/ JOHSEL NAMKUNG,
Principal.

This Costs Bond on Appeal approved this 2nd day of July, 1954.

/s/ WILLIAM J. LINDBERG,
District Judge.

This Cost Bond on appeal approved this 2nd day of July, 1954.

/s/ F. N. CUSHMAN,
Assistant United States Attorney.

Presented by:

/s/ KENNETH A. MacDONALD,
Attorney for Petitioner-Appellant.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated, subject to the approval of the United States District Court, that the time in which the record on appeal in the above-entitled case shall be filed with the United States Court for the Ninth Circuit and there docketed, shall be extended to and including, the second day of August, 1954.

/s/ KENNETH A. MacDONALD,
Attorney for Petitioner-Appellant.

CHARLES P. MORIARTY,
U. S. Atty;

By /s/ F. N. CUSHMAN,
Assistant U. S. Atty.

/s/ JOHN W. KEANE,
Attorney for United States Immigration and Naturalization Service.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE AND DOCKET RECORD ON APPEAL

This Matter having come on duly and regularly before the undersigned United States District Judge, upon the oral motion of petitioner and through his attorneys, MacDonald, Hoague and Bayless, for an order extending time to file and docket the record on appeal in the above-entitled case, pursuant to the provisions of Rule 73(g) Federal Rules of Civil Procedure, petitioner appearing in person and through his attorneys MacDonald, Hoague and Bayless, by Alec Bayless and respondent appearing by and through John Keane for the United States Immigration and Naturalization Service and through Charles P. Moriarty by F. N. Cushman, Assistant United States Attorney, and

It appearing to the Court that Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was duly and timely taken on June 3, 1954, and that less than forty days have expired from the date of filing the said Notice of Appeal and that the period for filing and docketing of said appeal has not expired and the Court having considered the stipulation of the counsel for petitioner-appellant and respondent-appellee, agreeing to extend the time for filing the record on appeal in this case to and including, the second day of August, 1954, and the Court being fully advised in the premises, Now Therefore

It Is Ordered that the time for filing and docketing the Record on Appeal in the above-entitled case be and it is hereby extended to and shall include the second day of August, 1954.

Done in Open Court this 2nd day of July, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ ALEX BAYLESS,
Of Counsel for Petitioner.

Approved:

/s/ JOHN W. KEANE,
Of Counsel for U. S. Immigration and Naturalization Service.

Approved:

CHARLES P. MORIARTY,
United States Attorney;

By /s/ F. N. CUSHMAN,
Assistant United States Attorney.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant through his attorney of record hereby designates the Concise Statement of Points on which Appellant intends to rely in the instant appeal.

1. Appellant was entitled to receive the full protection of the Fifth Amendment to the United States Constitution at his December 2, 1953, interview concerning his fear of physical persecution if deported to South Korea. A failure to accord to him this protection voids his Order of Deportation.

2. The regulations promulgated by the Attorney General of the United States implementing section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1101 et seq.), being 8 C.F.R. 243.3(b), 8 C.F.R 243.3 (3) and 8 C.F.R 6.21 have the force of law, are binding upon the Attorney General and a failure to comply therewith voids in its entirety the proceedings under said section 243(h) of the Immigration and Nationality Act of 1952.

3. Appellant has been denied procedural due process of law in the proceedings under said section 243(h) of the Immigration and Nationality Act of 1952 in that:

a. The Assistant Commissioner Border Patrol and Detention could have based his decision in whole

or in part upon the letter from the Korean Consul General attached to the Return to the Order to Show Cause as Exhibit D. Appellant never saw this letter; it was received after the close of the interrogation and appellant had no opportunity to examine concerning it or the letter from the Immigration Service which prompted it.

b. Said letter from the Korean Counsul General was not "evidence"; a decision in any way based upon it was in violation of applicable regulations.

c. Robert L. Needham in making Findings of Fact, Exhibit A attached to Return to Order to Show Cause garbled and misinterpreted the material and positive testimony of Dr. Frank E. Williston.

d. Appellant was denied procedural due process in that he was never advised until almost the date of his attempted deportation of the decision of Assistant Commissioner, W. F. Kelly, nor did he have a chance to move to reopen or reconsider as given by 8 C.F.R., 6.21(a).

/s/ KENNETH A. MacDONALD,
Of MacDonald, Hoague & Bayless, Attorneys for Johsel Namkung, Appellant.

Copies received.

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure and stipulation of counsel, I am transmitting herewith the following original documents as the record on appeal from the final judgment denying application for writ of habeas corpus, filed June 3, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed Mar. 26, 1954.
2. Order to Show Cause, filed Mar. 26, 1954.
3. Return to Order to Show Cause with following exhibits attached:

Exhibit "A"—Transcript of Dec. 2, 1953, interview with Johsel Namkung.

Exhibit 2—Affidavit of Johsel Namkung dated April 23, 1953.

Exhibit 3—Affidavit of Johsel Namkung, dated Oct. 27, 1953.

Exhibit "B"—Warrant of Deportation, dated April 8, 1953.

Exhibit "C"—Forwarding of Recommendation of Immigration Officer to Washington, D. C.

Exhibit "D"—Memorandum forwarding letter from Korean Consul General.

Exhibit "E"—Decision of Assistant Commissioner W. F. Kelly.

4. Amended Return of Respondent, filed April 13, 1954, with Exhibit "A" attached, said exhibit consisting of the following documents:

Ex. 1. Letter from brother of Johsel Namkung in Korean, as translated by Johsel Namkung.

Ex. 4. Newspaper story, Seattle Times, November 5, 1953.

Ex. 5 Newspaper story, Seattle Times, November 5, 1953.

9. Traverse, filed April 30, 1954.

11a. Stipulation as to agreed matters of fact, filed June 1, 1954.

12. Order Denying Writ of Habeas Corpus.

13. Notice of Appeal, filed June 3, 1954.

14. Deposit for Costs on Appeal, filed July 1, 1954.

15. Cost Bond on Appeal, filed July 2, 1954. ($200.00 cash by Pet'r.).

16. Stipulation extending time for docketing record on Appeal to August 2, 1954, filed July 2, 1954.

17. Order Extending Time for Docketing Record on Appeal to August 2, 1954, filed July 2, 1954.

18. Stipulation of Designation of Record to be contained in Record on Appeal, filed July 26, 1954.

19. Concise Statement of Points on Which Appellant Intends to Rely.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit: Filing fee, Notice of Appeal, $5.00, and that said amount has been paid to me by counsel for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 26th day of July, 1954.

[Seal] MILLARD P. THOMAS,
Clerk.

Chief Deputy.
By /s/ TRUMAN EGGER,

[Endorsed]: No. 14,459. United States Court of Appeals for the Ninth Circuit. Johsel Namkung, Appellant, vs. John P. Boyd, District Director of Immigration and Naturalization at the Port of Seattle, State of Washington, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 28, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14,459

THE UNITED STATES OF AMERICA ex rel. JOHSEL NAMKUNG,

Petitioner-Appellant,

vs.

District Director of Immigration and Naturalization at the Port of Seattle, State of Washington, JOHN F. BOYD,

Respondent-Appellee.

ADOPTION OF CONCISE STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

Appellant, Johsel Namkung, through his attorney of record, Kenneth A. MacDonald, in compliance with Rule 17 (6), Rules of Practice of United States Court of Appeals for the Ninth Circuit, does by this instrument adopt the Concise Statement of Points on Which Appellant Intends to Rely, it being Clerk of Court paper #19 in the above-entitled action in the United States District Court for the Western District of Washington, Northern Division, and it having been transmitted to the above-entitled Court on the 26th day of July, 1954, by Millard P. Thomas, Clerk of said District Court.

Appellant through his attorney of record hereby adopts the Designation of Record to be contained in Record on Appeal as set forth in the Stipulation of Designation of Record filed in the above-mentioned District Court of Washington, said Stipulation being clerk of court's paper #18, it having been transmitted to the above-entitled Court on the 26th day of July, 1954, by Millard P. Thomas, Clerk of said District Court.

Dated in Seattle, Washington, this 5th day of August, 1954.

/s/ KENNETH A. MacDONALD,
Attorney for Appellant.

[Endorsed]: Filed August 7, 1954.

No. 14459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHSEL NAMKUNG,

Appellant,

vs.

JOHN P. BOYD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF SEATTLE, STATE OF WASHINGTON,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
Assistant United States Attorney

JOHN W. KEANE
Attorney, Immigration and Naturalization Service

Office and Post Office Address:
1012 United States Court House
Seattle 4, Washington

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No. 14459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHSEL NAMKUNG,

Appellant,

vs.

JOHN P. BOYD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF SEATTLE, STATE OF WASHINGTON,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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No. 14459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHSEL NAMKUNG,

Appellant,

vs.

JOHN P. BOYD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF SEATTLE, STATE OF WASHINGTON,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by Section 2241, Title 28 U.S.C. and on this Court by Section 2253, Title 28, U.S.C.

STATUTE INVOLVED

In Section 243(h) of the Immigration and Nationality Act of 1952, Title 8 U.S.C., Sec. 1253(h) 66 Stat. 212, Congress has provided that:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such time as he deems necessary for such reason."

QUESTIONS PRESENTED

Whether the procedures followed by the Immigration Service in connection with the above statute denied appellant due process of law.

STATEMENT

Appellant, a native and citizen of Korea, last entered the United States at Anchorage, Alaska, on March 10, 1949, being admitted for permanent residence as a non-quota immigrant, to pursue the occupation of a professor. He had previously resided in this country during portions of 1947 and 1948 as a student.

Following appellant's arrest July 25, 1952, on a warrant of deportation charging that he was at the time of entry an alien affiliated with the Communist Party of the United States, a hearing was had and ap-

pellant was ordered deported on February 19, 1953. No appeal was taken administratively nor judicial review sought. It is conceded that appellant is deportable.

On October 8, 1953 appellant applied for a stay of deportation based upon the claim that he would be subject to physical persecution if deported to Korea. A hearing on this stay was held on December 2, 1953, at which time appellant was given an opportunity to present evidence in support of his claim. Appellant was represented by counsel at this hearing.

The record of the above mentioned hearing, together with the examining officer's summary and recommendation was forwarded to the Assistant Commissioner, Detention and Deportation Division on December 14, 1953. Thereafter on January 5, 1954, the examining officer forwarded for consideration, a letter from the Korean Consul General at San Francisco, to the effect that appellant would not be subject to physical persecution.

On February 15, 1954 the Assistant Commissioner ruled that "after careful consideration of the material the alien has submitted, and of his own testimony in support of his claim that he would be subject to physical persecution if deported to Korea, it is

not my opinion that the alien would be subject to physical persecution if deported to that country."

Oral notification was given to appellant on February 19, 1954, and thereafter appellant was surrendered into custody on March 25, 1954, on the same day that this proceeding was initiated below. After hearing on June 3, 1954 appellant's petition for a writ of habeas corpus was denied.

Notice of appeal to this court was filed on July 2, 1954.

SUMMARY OF ARGUMENT

Much of appellant's brief is devoted to the proposition that as an alien, he is entitled to the protection of the Fifth Amendment, both as to deportation proceedings and also those ancillary proceedings, in the instant case the granting or denying of suspension of deportation, which are discretionary in nature. Appellee freely admits that the procedural due process provided by the Fifth Amendment is applicable to the procedures in issue in this case.

The whole controversy here concerns the degree of administrative nicety which is required to comply with "substantial due process". Specifically, appellant charges a denial of due process in two actions taken

by the Service in connection with appellant's application for suspension of deportation.

First, appellant charges that the forwarding to the Assistant Commissioner and his alleged consideration thereof, of a letter from the Korean Consul General pertaining to appellant, was error. The theory being that the consideration of any evidence by the Service, received after having concluded hearings, without permitting the alien an opportunity to challenge said evidence, is error.

Appellee's position herein is, that the due process required by the Fifth Amendment must be consonant with the type of proceeding being conducted. In the instant case the relief requested is essentially discretionary in nature and as such, appellee must be permitted some latitude in the evidence considered, particularly where that evidence is not shown to be crucial, so long as the essential fairness of the proceedings is safeguarded. *Dolenz v. Shaughnessy*, 200 F. 2d 288, (2 Cir.).

Appellant's other basic contention is that the summary and recommendation made by the examining officer, a procedure normally followed in deportation hearings, deprived the Assistant Commissioner of his power to make an independent decision as to the exercise of his delegated discretionary power. It is

further claimed that this officer's opinion was given in violation of regulations provided by the Commissioner, simply because it was not expressly therein required.

Again, appellee submits that due process requires reasonableness in the circumstances. The giving of a recommendation by a subordinate cannot be said to so prejudice the mind of the person ultimately charged with the responsibility of decision, that he is prevented from exercising independent discretion. Many examples of administrative action can be found where a subordinate collects the factual information, digests same and submits an opinion with the material to the person on whom ultimate responsibility for decision rests.

The question of whether alleged action or inaction amounts to a denial of due process must be considered in light of the whole proceedings, their purpose and the ultimate result. Where the relief sought from an administrative agency is wholly discretionary in nature, and where no procedural regulations of that agency have been violated; an injured person must show that the agency action is foreign to normal standards of fairness and so vital to the decision made, that it prevents or pervades the exercise of the required discretion.

ARGUMENT

I.

IN REQUEST FOR DISCRETIONARY RELIEF, ALL RELEVANT TESTIMONY SHOULD BE CONSIDERED

Section 1253(h) of Title 8, U.S.C. Immigration and Nationality Act of 1952, clearly provides that the withholding of deportation on the ground of a physical persecution shall be discretionary. The phrases: "is authorized to withhold", "in his opinion", and "for such time as he deems necessary" can only be interpreted as requiring the exercise of discretion in a very broad sense. This interpretation is confirmed by the decision of the Second Circuit in the second Dolenz case, *Dolenz v. Shaughnessy*, 206 F. 2d 392, 394.

In aid of the exercise of the above described function, regulations were promulgated, 8 C.F.R. 243.3(b), which provided in Section 243B that a request for a stay by an alien to the district director, should be in writing and supported by an affidavit setting forth the reasons for request and such other evidentiary matter as may support the request. It was further provided in that section, subhead (2) that the alien *may* be required to submit to interrogation under oath, with a view to necessary explanation, of his claims or of the evidence which he has furnished and the estab-

lishment of the pertinent facts upon which a determination may be made in his case.

Thus we see an additional discretionary element, the permission to require aliens to appear for interrogation. Appellant not only does not dispute the validity of the above regulation but relies upon it as implying a requirement that no evidence not offered by the Government at that hearing, if one is held, can be considered by the person exercising discretion. Where the regulation does not require that all, or even any evidence, be presented by the government at this hearing and in fact the regulation does not even require a hearing, it is difficult to understand appellant's reliance thereon.

Appellant's contention that the receipt of the letter from the Korean Consul General subsequent to his interrogation, and its submission to and presumed consideration by the Assistant Commissioner was a denial of due process, must be considered against the background of a discretionary function, and the absence of any regulations pertaining in any way to this alleged error.

The concept "due process" has a great variety of meanings depending on the fact situation in question. This was explained in *Whitfield v. Hanges*, 222 Fed. 745 8 Cir.), also a case where the fairness of a

hearing was in question and the court said that one of the indispensable requisites of procedural due process was the principle, "That the course of the proceeding shall be appropriate and just to the party affected."

In a case identical insofar as the facts and applicable statute are concerned, to this one, *Dolenz v. Shaughnessy*, supra, at page 394, the Second Circuit stated:

> "Doubtless a court might intervene to stay deportation if the Attorney General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien. But we see nothing in the statute to suggest that the courts may insist that the Attorney General's opinion be based solely on evidence which is disclosed to the alien."

Although the *Dolenz* case, supra, was considering the use of confidential information, the court also said at p. 395:

> "We believe Congress intended the Attorney General to use whatever information he has."

Two concepts must be correlated in cases of this type. First, what are the requirements of reasonableness needed to fulfil procedural due process, and secondly, what is the available scope of judicial review of the discretionary administrative proceeding in which the alleged failure of due process is in issue.

In the *Dolenz* case, supra, the Court said at page 394 that:

> "That section (1952 Act provision) modified the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney General or his delegate. *The courts may not substitute their judgment for his.*" (Emphasis supplied)

And again at page 395, the court said

> "Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude."

In effect, the court in the *Dolenz* case has held, not only that the determination of the issue of persecution requires discretion of an administrator, which discretion must be based on all the information available to him from any source, whether political, confidential or merely from current sources such as newspapers, etc., but also that the fairness of procedural due process has been met when the opportunity to present evidence has been granted to the alien and such further opportunity to explain his evidence as is considered necessary by the regulations of the Service is granted.

Congress saw fit to rest the suspension of deportation wholly on the discretion of the Attorney

General. The statutory provision permitting this discretionary action is silent on the procedure to be required. The regulations promulgated thereunder do not contemplate a litigious type of hearing. Could Congress have expected a judicial type of proceeding in which the reports of all government agencies having contact with the foreign country involved would be bared. Deportation statutes have always expressly provided for a more formal procedure, and surely Congress was aware of that situation. Deportation, as an example, rests on a concrete fact situation that has already occurred and can usually be rigidly applied to the particular alien in question. Fear of persecution on the other hand is entirely supposition and hypothesis and as is so often stated by Jurists, a court will not consider a hypothetical matter which is rooted in speculation and conjecture. Nor should the courts compel an administrator who is faced with this hypothetical problem, to restrict his area of decision to that evidence which could be presented in an adversary judicial hearing.

Additionally, does due process require the Attorney General to ignore knowledge or information known to him because it is not presented at a hearing, even if presentation at a hearing would serve no purpose? For example, should cross examination of a

foreign ambassador be required; would it serve any useful purpose?

The decision of the Attorney General's representative will be difficult at best due to the lack of normal sources of information from countries where persecution might be present. Often his decision will of necessity be based on little more information than that available to qualified foreign correspondents. Should the courts attempt to restrict his power to consider all available information?

In the instant case it should be presumed that reports of many government agencies pertaining to the situation in Korea were utilizied, that newspaper and periodical articles were checked. The letter from the Korean Consul General must have been but one small part of the evidence available in this case and may well, under the circumstances, have been given little or no weight. There is no showing in the record to the contrary.

II.

DOES DUE PROCESS PROHIBIT A SUBORDINATE'S ATTEMPT TO AID A SUPERIOR, CHARGED WITH A FINAL DECISION, BY SUMMARIZING AND MAKING RECOMMENDATIONS OF EVIDENCE?

The appellant claims that the proceeding is infected with unfairness because a regulation has been

violated and he cites cases to substantiate this point. He fails to point out, however, that the statute and the regulations are silent on whether or not a summary should be made by a subordinate and forwarded to the Attorney General or the person acting in his stead. He assumes that because the statute and regulations are silent such action is prohibited. Therein lies the infirmity of his argument. The cases cited by the appellant, without exception, present a situation where a regulation is promulgated for the purpose of insuring due process or essential fairness in administrative procedure. When the agency fails to adhere to the regulations it also fails to accord due process. Here the subordinate did more than required, not less than required.

The practice of summarizing evidence in administrative proceedings has become an accepted practice under administrative law. The principle is so firmly established that it requires no citation of authority. It is academic. Indeed, Congress has embodied such practice in the Administrative Procedure Act in Section 8 thereof (5 U.S.C.A. 1007). It has been always considered an aid to due process not a deterrent. Certainly such an approved procedure could not be unfair merely because it was resorted to in the absence of regulations requiring it. 18 A.L.R. 2d 626, p. 11.

The procedure, then, not being unfair, the only area of unfairness must be in the manner in which the hearing was summarized. Here, too, the appellant relies on an assumption not supported by the record. Without any basis in fact, he asserts that the Attorney General or his agent, did not give any independent consideration to the evidence submitted but blindly followed the summary and recommendation of the subordinate. In the absence of evidence to the contrary it is presumed that the Assistant Commissioner considered the evidence and exercised his independent judgment. *Cunard S.S. Co. v. Elting*, 97 F. 2d 373, 18 A.L.R. 2d 625, 42 Am. Jur. 680, Public Administrative Law, Section 240.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
Assistant United States Attorney

JOHN W. KEANE
Attorney, Immigration and Naturalization Service

No. 14460

United States Court of Appeals

for the Ninth Circuit.

JUNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-26-54

No. 14460

United States Court of Appeals

for the Ninth Circuit.

JUNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-26-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Honolulu 13, Hawaii,

A. L. WIRIN, ESQ., and
FRED OKRAND, ESQ.,
257 South Spring Street,
Los Angeles 12, California.

For the Defendant, John Foster Dulles, Secretary of State of the United States of America:

A. WILLIAM BARLOW, ESQ.,
United States Attorney,
District of Hawaii and,

LOUIS B. BLISSARD, ESQ.,
Assistant United States Attorney, District of Hawaii,
Federal Building.
Honolulu, T. H.

In the District Court of the United States for the District of Hawaii

Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Defendant.

Proceedings Under Section 503 United States Nationality Act of 1940 (8 USCA Section 903)

COMPLAINT

Comes now Junso Fujii, Plaintiff above named, and complaining of Defendants above named, shows as follows:

I.

That the Plaintiff is a citizen of the United States of America by virtue of his birth at Honolulu, City and County of Honolulu, Territory of Hawaii, on August 30, 1911; that the Plaintiff is at present residing at #22 Saiku-machi, Hiroshima-shi, Japan; that the Plaintiff claims the Territory of Hawaii as his permanent residence and intends to reside therein.

II.

That the Defendant, John Foster Dulles, is the Secretary of State of the United States of America; that the United States Department of State is an agency of the United States Government; and that

the United States Foreign Service is a part of the United States Department of State.

III.

That the Plaintiff last resided in the United States of America at Honolulu aforesaid; that he left the United States on [4*] May 2, 1939, and has resided in Japan since that date; and that the Plaintiff is at present married and has three (3) children.

IV.

That from March 24, 1945, to February 8, 1946, the Plaintiff served in the Japanese Armed Forces.

V.

That quite sometime ago, the Plaintiff executed a Petition addressed to the American Consular Service at Kobe, Japan, for the purpose of securing a passport in order that said Plaintiff might come to the Territory of Hawaii from Japan as an American citizen; that said Petition was supported by the necessary documents and affidavits; that all of the requests of the said American Consulate for information as to the Plaintiff's citizenship have been complied with to the best of the Plaintiff's ability; that the Plaintiff made inquiries of the said American Consulate as to the status of said Petition, but no determination has as yet been made by said Consulate as to said Petition.

VI.

That the non-action and inexcusable delay upon the part of said Consulate to issue to the said Plain-

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

tiff said passport is a denial of the Plaintiff's rights and privileges as a United States citizen.

VII.

That the Plaintiff's service in the Japanese Armed Forces was not his free and voluntary act.

VIII.

That as a result of said non-action, the Plaintiff is not able to enter the United States and such is a denial of his rights and privileges as a United States citizen. [5]

IX.

That the Plaintiff claims that he is a United States citizen by virtue of the fact that he was born in the United States of America; that he is entitled to establish and to have this Court declare his United States Nationality under Section 503 of the United States Nationality Act of 1940; that as a citizen and national of the United States, he is entitled to a United States passport and to enter and reside in the United States.

Wherefore, Plaintiff prays for a judgment and decree adjudging that he is a citizen and/or national of the United States of America, and as such, is entitled to the rights and/or privileges of a citizen and/or national of the United States, including the right to be issued a United States passport and a right to enter and reside in the United States of America.

Dated at Honolulu, T. H., this 16th day of December, A.D. 1952.

JUNSO FUJII,
Plaintiff.

By A. L. WIRIN, FRED OKRAND and FONG, MIHO, CHOY & CHUCK,
His Attorneys,

By /s/ WALTER G. CHUCK.

Duly Verified.

[Endorsed]: Filed December 16, 1952. [6]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT PURSUANT TO 8 USC 903, 8 USC 1503(a) AND 28 USC 2201

Comes now Plaintiff above named, files this pleading as of course, pursuant to Rule 15(a), Federal Rules of Civil Procedure, no responsive pleading having been served, and alleges:

I.

Plaintiff is a citizen of the United States. He was born at Honolulu, Territory of Hawaii, on August 30, 1911. He claims the Territory of Hawaii, within the jurisdiction of this Court, as his permanent residence. At the time this suit was filed, Plaintiff was temporarily residing in Japan. Plaintiff is now within the United States, in the Territory of

Hawaii, arriving on February 18, 1953, on a Certificate of Identity executed by the Vice Consul, pursuant to the provisions of 8 USC 903, on January 14, 1953, and issued to the Plaintiff on January 28, 1953. [9]

II.

Defendant, John Foster Dulles, is the Secretary of State of the United States. As such he is the head of the Department of State of the United States.

III.

Plaintiff served in the Armed Forces of Japan from March 24, 1945, to February 8, 1946. Said service was not the free or voluntary act of Plaintiff, but was as the result of duress and coercion.

IV.

On or about October 17, 1952, Plaintiff applied at the office of the American Vice-Consul, Kobe, Japan, for registration as a citizen of the United States. Said application for registration was denied Plaintiff by said Vice-Consul on the ground that Plaintiff had lost his United States citizenship under 8 USC 801(c) by reason of the aforesaid service in the Japanese Armed Forces, and instead, on November 20, 1952, said Vice-Consul executed under his official seal as Vice-Consul of the United States a Certificate (as to Plaintiff) of the Loss of the Nationality of the United States on the ground aforesaid. Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington office of the Department of State on March 18, 1953.

In so acting, the American Vice-Consul at Kobe, as well as the Washington office of the Department of State, acted as the agents of and for and on behalf of the Defendant and his predecessor in office. In so acting, said persons denied to Plaintiff a right and privilege as a citizen and national of the United States. [10]

Wherefore, Plaintiff prays for a judgment declaring that he is a citizen and national of the United States and that he did not lose his United States citizenship pursuant to 8 USC 801(c) by reason of his service in the Japanese Armed Forces.

Dated at Honolulu, T. H., this 15th day of March, A.D. 1954.

JUNSO FUJII,
Plaintiff.

By FONG, MIHO, CHOY & CHUCK and A. L. WIRIN and FRED OKRAND,
His Attorneys.

By /s/ FRED OKRAND.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1954. [11]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL PORTIONS OF AMENDED AND SUPPLEMENTAL COMPLAINT

To the Defendant above named: to his attorney, A. William Barlow, United States Attorney, and Louis B. Blissard, Assistant United States Attorney:

Please Take Notice: On the 19th day of March, 1954, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard in the Courtroom of the Honorable J. Frank McLaughlin, Judge of the above-entitled Court, Plaintiff will move the Court for leave to file the following portions of the Amended and Supplemental Complaint, heretofore presented to the court:

From Paragraph I:

"Plaintiff is now within the United States, in the Territory of Hawaii, arriving on February 18, 1953, on a Certificate of Identity executed by the Vice-Consul, pursuant to the provisions of 8 USC 903, on January 14, 1953, and issued to the Plaintiff on January 28, 1953."

From Paragraph IV:

In first paragraph thereof: [13]

"Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington office of the Department of State on March 18, 1953."

In the second paragraph thereof:

"as well as the Washington office of the Department of State."

Said motion will be made on the ground that said matter occurring subsequent to the filing of the Complaint should be before the Court in this litigation.

Said motion will be based upon Rule 15(d), Federal Rules of Civil Procedure, and upon all the records and files in this case.

Dated at Honolulu, T. H., this 18th day of March, A.D. 1954.

JUNSO FUJII,
Plaintiff.

By FONG, MIHO, CHOY & CHUCK and A. L. WIRIN & FRED OKRAND,
His Attorneys.

By /s/ FRED OKRAND.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1954. [14]

In the United States District Court for the
District of Hawaii
Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of Ameria,

Defendants.

MOTION TO DISMISS

Comes now John Foster Dulles, Secretary of State of the United States of America, Defendant above named, by his attorney, A. William Barlow, United States Attorney for the District of Hawaii, and moves that the Amended Complaint herein be dismissed on the grounds that this court lacks jurisdiction over the subject matter. The affidavit of Louis B. Blissard, Assistant United States Attorney for the District of Hawaii, filed herein on March 12, 1954, is incorporated herein by reference and made a part hereof.

Dated: Honolulu, T. H., this 23rd day of March, 1954.

A. WILLIAM BARLOW,
United States Attorney, District of Hawaii, Attorney for Defendants.

By /s/ LOUIS B. BLISSARD,
Assistant United States Attorney, District of Hawaii.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 23, 1954. [16]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

Territory of Hawaii,
City and County of Honolulu—ss.

Louis B. Blissard, being first duly sworn on oath, deposes and says:

That he is an Assistant United States Attorney for the District of Hawaii;

That he has been informed by the Secretary of State of the United States and therefore states the fact to be that Junso Fujii filed an Application for Registration as an American citizen on October 17, 1952, with the American Vice-Consul, Kobe, Japan;

That on November 20, 1952, the said American Vice-Consul, after interview, investigation, and record check, wrote an opinion in which he stated that it was his belief that the applicant had lost his claim to American citizenship; that the said Vice-Consul certified the facts upon which such belief was based to the Department of State, such report being contained in a Certificate of the Loss of the Nationality of the United States, all in accordance with the provisions of Section 501 of the Nationality Act of 1940, (8 USC Section 901) and regulations issued by the Secretary of State pursuant thereto;

That the aforesaid opinion and certificate were received by the Department of State, Passport Division, on December 18, 1952, two days after this suit was filed;

That the aforesaid report or certificate was approved by the Secretary of State on March 18, 1953;

That the Application for Registration was refused on March 20, 1953;

That a copy of the Certificate of the Loss of the Nationality of the United States was thereupon forwarded to the applicant, Junso Fujii, plaintiff herein.

Further affiant sayeth not.

/s/ LOUIS B. BLISSARD.

Subscribed and sworn to before me this 12th day of March, 1954.

[Seal] /s/ E. L. KAANEKE,
Deputy Clerk, United States District Court.

Endorsed]: Filed March 12, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO CORRECT AMENDED AND SUPPLEMENTAL COMPLAINT

To the Defendants Above Named, and his attorneys, A. William Barlow, United States Attorney, and Louis B. Blissard, Assistant United States Attorney,

Please Take Notice, that:

On the 19th day of April, 1954, in the courtroom of the Honorable J. Frank McLaughlin, Judge of

the above-entitled Court, at the hour of 9:00 o'clock a.m., or as soon thereafter as counsel may be heard, Plaintiff will move the court for leave to correct the last sentence of the first paragraph of Paragraph IV of the amended and Supplemental Complaint so as to read:

"Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington office of the Department of State on December 18, 1952."

The effect of this amendment is to change so much of said sentence as reads "March 18, 1953," so that it reads [18] "December 18, 1952."

Dated at Honolulu, T. H., this 17th day of April, A.D. 1954.

FONG, MIHO, CHOY & CHUCK,
A. L. WIRN & FRED OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 19, 1954. [19]

[Title of District Court and Cause.]

MINUTES—WEDNESDAY, MARCH 17, 1954

On this day came Mr. Fred Okrand of the firm of Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States District Attorney, counsel for the

defendant herein, this case being called for hearing on amended and supplemental complaint.

Upon Mr. Blissard's statement that the amended and supplemental complaint does not comply with the provisions of Rule 15(d) of the Federal Rules of Civil Procedure and following argument thereon, the Court informed counsel that the pleading has been filed out of order and that counsel may cure same by filing a motion for leave to file same.

The Court informed counsel that hearing on the motion to dismiss will be held in abeyance in the meantime. [20]

[Title of District Court and Cause.]

MINUTES—FRIDAY, MARCH 19, 1954

On this day came Mr. Fred Okrand of the firm Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States District Attorney, counsel for the defendant herein, this case being called for hearing on notice of motion for leave to file supplemental portions of amended and supplemental complaint.

Upon request of Mr. Okrand, the Court ordered this case continued until the return of Mr. Okrand from Japan. [21]

[Title of District Court and Cause.]

MINUTES—TUESDAY, APRIL 20, 1954

On this day came Mr. Katsuro Miho of the firm Fong, Miho, Choy & Chuck, and Mr. Fred Okrand of the firm Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States Attorney, counsel for the defendant herein, this case being called for hearing on motion by plaintiff for inspection of documents, motion for leave to file supplemental portions of amended and supplemental complaint, motion for leave to correct amended and supplemental complaint, and motion to dismiss.

Following argument by respective counsel on the motion for inspection of documents, the Court held that the plaintiff was entitled to inspect the documents as requested and such other documents that may have been voluntarily submitted with his application for a passport or certificate of identity.

At 2 p.m., motion for leave to correct amended and supplemental complaint was allowed by the Court in view of Mr. Okrand's assertion and the fact that the plaintiff is now in the Territory of Hawaii.

Further argument was then had by Mr. Okrand on motion for leave to file supplemental portions of amended and supplemental complaint.

At 4 p.m., the Court ordered this case continued to April 21, 1954, at 9 a.m., for further [22] argument.

[Title of District Court and Cause.]

MINUTES—WEDNESDAY, APRIL 21, 1954

On this day came Mr. Katsuro Miho of the firm Fong, Miho, Choy & Chuck, and Mr. Fred Okrand of the firm Wirin & Okrand, counsel for the plaintiff herein, and also came Mr. Louis B. Blissard, Assistant United States Attorney, counsel for the defendant herein, this case being called for further hearing on motion for leave to file supplemental portions of amended and supplemental complaint and on motion to dismiss.

Following argument by Mr. Blissard and further argument by Mr. Okrand, the Court granted the motion to dismiss for lack of jurisdiction. [23]

In the United States District Court for the District of Hawaii

Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Defendant.

ORDER OF DISMISSAL

The Motion to Dismiss of the defendant, John Foster Dulles, having come on to be heard before

the Court on April 21, 1954; the petitioner having been represented by his counsel, Fred Okrand, Esquire, and Katsuro Miho, Esquire, and the defendant having been represented by Louis B. Blissard, Esquire, Assistant United States Attorney of this District; the motion having been fully argued and submitted to the Court for decision; the Court having found the motion to be well taken on the ground stated therein, namely that the Court lacks jurisdiction over the subject matter.

Now Therefore, it is hereby ordered, adjudged and decreed that this cause and the petition herein be and the same are dismissed.

Dated: Honolulu, T. H., this 24th day of May, 1954.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

No Objection as to Form.

/s/ FRED OKRAND.

[Endorsed]: Filed May 24, 1954. [25]

[Title of District Court and Cause.]

RULING ON MOTION TO DISMISS

The plaintiff has filed this timely action under Section 503 of the Nationality Act of 1940, 8 U.S.C. §903, petitioning this court for judgment declaring him to be a citizen of the United States.

The original complaint was filed December 16, 1952, and alleged that the plaintiff was a citizen of the United States by virtue of his birth in Honolulu, T. H., on August 30, 1911, but that he left the United States on May 2, 1939, to go to Japan, and has resided there ever since. It was alleged also that from March 24, 1945, to February 8, 1946, the plaintiff served in the Japanese Armed Forces, although that service was not his free and voluntary act, and

"That quite some time ago, the Plaintiff executed a Petition addressed to the American Consular Service at Kobe, Japan * * *" for a passport, but that no action had been taken on the petition and that the "non-action and inexcusable delay" by the consulate constituted a denial of the plaintiff's rights and privileges within the meaning of 8 U.S.C. § 903.

Subsequently, on March 15, 1954, the plaintiff filed an amended complaint in which it was alleged as folows:

1. That what the plaintiff had sought on the above occasion was actually registration as an American citizen and this was done [27] on October 17, 1952.

2. That this application was denied on November 20, 1952, when the Vice-Consul executed a Loss of Nationality Certificate relating to the plaintiff by reason of his service in the Japanese Armed Forces.

3. That such constituted a denial within the meaning of Section 903.

To both of these complaints, the defendant filed a motion to dismiss. At the hearing on the latter, the following additional facts were adduced: First, that at the time of the filing of the original complaint, the plaintiff was unaware that the Vice-Consul had, on November 20, 1952, executed a Loss of Nationality Certificate and forwarded the same to the State Department in Washington, D. C., in accordance with 8 U.S.C. § 901; secondly, that on December 18, 1952, the State Department sent a telegram to the American Consul at Kobe, approving a number of Certificates executed by him, one of which was the plaintiff's. (This Certificate was formally approved by the State Department March 18, 1953, and the plaintiff's application denied by the United States Consul in Kobe March 20, 1953.)

The original complaint depends for its validity upon the theory that the denial necessary for an action under 8 U.S.C. § 903 resulted from the "inexcusable delay" by the Consulate in processing the plaintiff's application. Section 903 states that the claimant must be denied a right or privilege as a national of the United States "upon the ground that he is not a national of the United States * * *" Without alleging such a basis for the denial, the plaintiff states no claim within the meaning of the Nationality Act of 1940, 8 U.S.C. § 903. Dulles [28] v. Lee Gnan Lung, No. 13,695, 9th Cir., March 30, 1954; Yoichi Fujii v. Dulles, Civil No. 1300, D. Hawaii, May 28. 1954. Merely alleging delay without alleging the denial to have been rested upon this

ground is insufficient for the purposes of the statute, for the delay may be occasioned by reasons other than that the applicant is not a national of the United States. Jack Len Lee, Guardian ad litem for Sing Hoon Lee and Sing Yuen Lee, v. Dulles, Civil No. 1188, D. Hawaii, June 1, 1954.

While delay by the Government in granting the right petitioned for may well be, in effect, a denial of that right, this delay must have been of unreasonable duration in order to call this principle into operation. In view of the nature of these claims, and the time needed for their processing, the two-months' delay complained of here would clearly not be of unreasonable length, even if it were alleged to have been founded on plaintiff's lack of nationality—an allegation which does not appear in this original complaint.

Therefore, the original complaint fails to state a claim upon which relief can be granted, and does not effectively invoke the jurisdiction of this court.

The amended complaint proceeds upon the theory of an express denial. It is therein alleged that the execution on November 20, 1952, of the Loss of Nationality Certificate constituted a denial of the plaintiff's rights within the meaning of Section 903. This position is untenable and it is unnecessary to decide whether it is the execution by the Consul of this document or its approval by the State Department in Washington, D. C., which is the denial, for the Consul's action is certainly not a denial when it is

uncommunicated to the plaintiff prior to the filing of the complaint. Hitaka Suda v. Dulles, Civil No. 1302, D. Hawaii, April 26, 1954. [29]

Thus, the first event in this case which could conceivably qualify as a denial for the purposes of the statute is the telegraphic approval by the State Department of this Certificate on December 18, 1952, two days after the filing of the complaint; this allegation is sought to be added to the amended complaint supplementally. Even if this request be granted, this fact does not avail the plaintiff, because it occurred subsequent to the filing of the complaint and is ineffectual to relieve that document's invalidity or its prematurity.

There is merit in the contention of the defendant that inasmuch as the original complaint fails to comply with Rule 8(a) of the Federal Rules of Civil Procedure, all amendatory and supplemental material should be precluded on the ground that there is nothing in being possessing legal spark and life to be amended or supplemented, and it is sought to be added after the statutory basis for such an action has been repealed by Congress. However, this court will allow the amendments and supplements inasmuch as the amended complaint was filed pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, and it having been held thereunder that a motion to dismiss is not a responsive pleading. Kelly v. Delaware River Joint Commission, 187 F.2d 93, 94 (3rd Cir. 1951), cert. denied, 342 U.S.

812 (1951); United States v. Newbury Mfg. Co., 123 F.2d 453 (1st Cir. 1941).

As noted before, however, there still are no facts alleged here upon which a valid denial can be predicated prior to the filing of the original complaint.

In order to preserve his right of action, the plaintiff seeks to invoke the Saving Clause, Section 405 of the Immigration and Nationality Act, 8 U.S.C. § 1101 note. That section provides in part: [30]

> "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, * * * or any * * * right in process of acquisition, * * * done or existing, at the time this Act shall take effect; * * *"

The plaintiff argues that even if the original complaint be held invalid, he still initiated a suit, action, or proceeding within the meaning of the Saving Clause and consequently the applicable provisions of the 1940 Act are continued in full force and effect.

However, the Saving Clause presupposes a valid suit, or a valid action. Here the original complaint is a nullity, and there is in effect nothing to save.

The plaintiff further contends that his right of action is protected under the Saving Clause as a "right in process of acquisition." It has been held that this phrase is inapplicable to a mere right to

bring a declaratory action under 8 U.S.C. § 903. The existence of the cause of action, without more, does not amount to a right within the meaning of the Saving Clause; it is only a remedy which Congress has the power to change or abolish. Avina v. Brownell, 112 F.Supp. 15 (S.D. Tex. 1953).

This court has held before in Miyoko Ishida v. Dulles, Civil No. 1250, D. Hawaii, April 21, 1954:

> "And expressly on the ground of the motion to reconsider do I hold that the Saving Clause does not here avail this plaintiff for the right in the process of acquisition that this plaintiff was pursuing at the time the statute expired was a right not to a declaratory judgment of citizenship but was an administrative procedure seeking thereunder a pasport. Implied in that holding is the fact that rights are to be distinguished from remedies, and that the remedy being statutory it can be obliterated by Congress at any time it sees fit, before same ripened into judgment or as preserved by a Saving Clause by reason of having been actually invoked. No judicial step was ever taken because the plaintiff was not eligible during the life of the statute to preserve the judicial remedy under the Saving Clause.
>
> "Accordingly, the phrase 'Right in the [31] process of acquisition' is inapplicable here * * *"

The plaintiff cites in opposition to this argument the cases of Petition of Menasche, 115 F.Supp. 434

(D. Puerto Rico, 1953), aff'd. 210 F.2d 809 (1st Cir. 1954); and In re Jocson, 117 F.Supp. 528 (D. Hawaii 1954); wherein the Saving Clause was held to be applicable. There the plaintiffs had, as aliens, initiated steps toward their naturalization as American citizens under the Nationality Act of 1940 and sought approval of their petitions subsequent to its repeal. The courts held that the initiation of the process for citizenship gave to the petitioners rights in process of acquisition within the meaning of the Saving Clause, and consequently the latter continued the applicable provisions of the 1940 Act in full force and effect.

This court does not disagree with those principles; however, we would say that not only must affirmative action to comply with the statutory requirements be commenced, but it must be begun in a valid manner before it can be said that the plaintiff has a right-in-process-of-acquisition to which the Saving Clause can apply. See United States v. Menasche, supra. Nothing short of this will preserve a plaintiff's statutory remedy under the Nationality Act of 1940 subsequent to its repeal. Under that statute, both Jocson and Menasche validly complied with the statutory provisions necessary to the attainment of their judicial right, viz., naturalization. On the other hand, in order to obtain the judicial right subsequently sought by this plaintiff (he initially sought administrative relief only), he had to file a suit pursuant to 8 U.S.C. § 903 and in accordance with the rules of federal pleading. Failing in this, he

likewise failed to acquire a right in process of acquisition which the Saving Clause in the 1952 Act would protect. [32]

The Saving Clause is admittedly broad, but does not avail one such as this plaintiff who had not prior to December 24, 1952, the date of the repeal of the Nationality Act of 1940, stated a valid claim within the meaning of Rule 8 of the Federal Rules of Civil Procedure.

Lastly, the plaintiff contends that the counterpart of 8 U.S.C. § 903 in the Immigration and Nationality Act (1952), i.e., 8 U.S.C. § 1503(a) is here applicable. This section provides in part:

> "If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action * * *" (Emphasis added).

This does not help this plaintiff, because it seems clear that since the Immigration and Nationality Act (1952) provides a new statutory cause of action, this Act cannot be invoked unless an action thereunder was instituted subsequent to its enactment and while the claimant was in the United States. Teruo Tamada v. Dulles, Civil No. 1273, D. Hawaii, April 23, 1954. That decision disposes of the same contention in the instant case, since this complaint

was filed before the new statutory cause of action arose.

We are aware of the existence of other questions which have only an indirect bearing on this case. One question is whether or not a plaintiff present in the United States under authority of a Certificate of Identity, issued under the old Act and Regulations, has standing to prosecute any action other than that for which his certificate was issued. 8 U.S.C. § 903, 22 C.F.R. § 50.18, et seq. Another arises under the new Act, which seems to say that in order to state a cause of action now, a plaintiff must show that any denial of a right or privilege as a national, on the ground that he is not a national, [33] had occurred while he was in the United States. These, however, need not be decided here.

For the reasons herein contained, we hold that the plaintiff has failed to comply with Rule 8 of the Federal Rules of Civil Procedure, and the defendant's motion to dismiss is therefore granted.

Dated at Honolulu, Hawaii, this 23rd day of June, 1954.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed June 23, 1954. [34]

[Title of District Court and Cause.]

DOCKET ENTRIES

Date Filings-Proceedings

1952

Dec. 16—Filing Complaint. Issuing Summons. Certifying 4 copies for service. (6 pages ea.)

Dec. 22—Filing U. S. Marshal's Return on Service of Writ (served).

1953

Feb. 6—Filing Motion to Dismiss and Memorandum of Points and Authorities.

1954

Mar. 12—Filing Affidavit in Support of Motion to Dismiss.

Mar. 12—Notice of Motion filed.

Mar. 15—Amended and Supplemental Complaint pursuant to 8 USC 903, 8 USC 1503(a) and 28 USC 2201 filed.

Mar. 17—Entering proceedings—objections to filing of amended and Supplemental Complaint by Blissard. Arguments by Counsel—Oral Ruling—Plaintiff to file Motion for Leave to File, etc.—Motion to Dismiss continued.

Mar. 18—Notice of Motion for Leave to File Supplemental Portions of Amended and Supplemental Complaint filed.

Mar. 19—Entering proceedings—Motion for leave to file, etc.—continued until the return of Okrand from Japan.

1954

Mar. 23—Motion to Dismiss filed.

Apr. 19—Filing Notice of Motion by Plaintiffs for Inspection of Documents.

Apr. 19—Notice of Motion for Leave to Correct. Amended and Supplemental Complaint filed.

Apr. 20—Entering proceedings at hearing on motion for inspection of documents, etc. Arguments—Motion for Inspection of Documents granted—Motion to correct amended and supplemental complaint — allowed — continued to April 21, 1954, at 9 a.m.

Apr. 21—Entering proceedings at further hearing on motion for leave to file supplemental portions of amended complaint, etc. Further arguments — Motion to Dismiss — Granted—Lack of Jurisdiction.

May 10—Copy of Reporter's Transcript—Oral Decision on Motions for Inspection of Documents—filed in Civil No. 1273.

May 24—Order of Dismissal filed. [35]

June 23—Ruling on Motion to Dismiss filed.

July 1—Notice of Appeal; Designation of Record on Appeal and Statement of Points Upon Which Appellant Intends to Rely on Appeal filed.

July 8—Designation of Record on Appeal filed. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Junso Fujii, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order dismissing the complaint entered in this action on May 24, 1954.

Dated: July 1, 1954.

FONG, MIHO, CHOY and CHUCK,

A. L. WIRIN & FRED OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 1, 1954. [38]

In the United States District Court
for the District of Hawaii

Civil No. 1261

JUNSO FUJII,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,

Defendant.

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk, U. S. District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause consists of a statement of the names and addresses of the attorneys of record, and of the various original pleadings and other papers as hereinbelow listed and indicated:

Original Pleadings

Complaint.

Amended and Supplemental Complaint Pursuant to 8 USC 903, 8 USC 1503(a) and 28 USC 2201.

Notice of Motion for Leave to File Supplemental Portions of Amended and Supplemental Complaint.

Motion to Dismiss.

Notice of Motion for Leave to Correct Amended and Supplemental Complaint. [43]

Order of Dismissal.

Ruling on Motion to Dismiss.
Notice of Appeal.
Designation of Record on Appeal.
Designation of Record on Appeal.

I further certify that included in said record on appeal is a copy of the Minutes of Court of March 17, 1954; March 19, 1954; April 20, 1954, and April 21, 1954, and Docket Entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this .... day of July, A.D. 1954.

[Seal] WM. F. THOMPSON, JR.,
Clerk. [44]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant herewith, pursuant to Rule 75(d), Federal Rules of Civil Procedure, hereby states the following as the points upon which he intends to rely on appeal:

1. The Court has jurisdiction over the subject matter.

2. The Court erred in dismissing the cause and the petition.

Dated: July 1, 1954.

FONG, MIHO,
CHOY & CHUCK,
A. L. WIRIN, &
FRED OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellant.

[Endorsed]: No. 14,460. United States Court of Appeals for the Ninth Circuit. Junso Fujii, Appellant, vs. John Foster Dulles, Secretary of State of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed July 29, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14460

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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197 King Street,
Honolulu, Hawaii,

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257 South Spring Street,
Los Angeles 12, California,

Attorneys for Plaintiff and Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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No. 14460

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This is an appeal from the District Court's order dismissing the action on the ground of lack of jurisdiction over the subject matter [R. 18].

The action is under 8 U. S. C. 903 for a declaration pursuant to that section that plaintiff is a national of the United States [R. 3-6].

The District Court had jurisdiction under 8 U. S. C. 903. The order of Dismissal was filed on May 24, 1954.

Notice of Appeal was filed on July 1, 1954. This Court has jurisdiction to review the order of dismissal under 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Plaintiff filed an amended and supplemental complaint, the amending portions of which were filed as of course under Rule 15(a), Federal Rules of Civil Procedure, no responsive pleading having been served or filed [R. 6]; and the supplementary portions of which were allowed to be filed by the trial court [R. 22, 29], after notice of motion for leave to file same [R. 9, 13], and over the objections of defendant [R. 15, 28].

The question as to whether the court had jurisdiction over the subject matter was raised by defendant by way of objection to the filing of the amended and supplemental complaint [R. 15, 16, 17], and by way of motion to dismiss [R. 11, 29].

Statutes Involved.

8 U. S. C. 903, under which the complaint was filed, provides in pertinent part:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person . . . may institute an action against the head of such Department or agency . . . in the district court of the United States for the district in which

such person claims a residence for a judgment declaring him to be a national of the United States . . ."

Section 405a of the Immigration and Nationality Act, 1952 (66 Stat. 166, *et seq.*), the "saving clause" provides in pertinent part (note to 8 U. S. C. 1101):

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any . . . proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes (*sic*), conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Facts.

The pertinent facts alleged, deemed admitted by the motion to dismiss, are these:

Plaintiff was born in Hawaii on August 30, 1911 [R. 6], and, therefore, was born a citizen of the United States (14th Amend, U. S. Const.).

On or about October 17, 1952, plaintiff applied at the office of the American Vice Consul at Kobe, Japan, for registration as a citizen of the United States [R. 7].

(See 22 C. F. R. 107.2.) The Vice Consul denied such application for registration on the ground that plaintiff had lost his United States citizenship under 8 U. S. C. 801(c) by reason of plaintiff having served in the Japanese Armed Forces [R. 7]. Instead of registering plaintiff as a United States citizen as applied for, the Vice Consul, on November 20, 1952, executed under his official seal as Vice Consul of the United States, a Certificate (as to plaintiff) of the Loss of the Nationality of the United States on the ground of said Japanese Military Service [R. 7]. The Washington office of Department of State, on December 18, 1952, approved this action taken by the Vice Consul at Kobe [R. 14].

In so acting, the Vice Consul at Kobe, Japan, as well as the Washington office of the Department of State, acted as agents for and on behalf of the defendant, Secretary of State [R. 7, 8].

Plaintiff claims Hawaii as his permanent residence [R. 6].

Plaintiff prayed for a judgment declaring that he is a national of the United States [R. 8].

The original complaint was filed on December 16, 1954 [R. 3-6, 28]. The Immigration and Nationality Act, 1952, went into effect on December 24, 1952 (note to 8 U. S. C. 1101). By its savings clause (Sec, 405(a)(c); note to 8 U. S. C. 1101), 8 U. S. C. 903 and 801(c) were continued in force and effect. The amending portions (setting forth the actual denial of the application for regis-

tration and the execution by the Vice Consul of the Certificate of Loss on November 20, 1952 [R. 7]) of the amended and supplemental complaint were filed as of course on March 15, 1954 [R. 6-8, 28]. Notice of Motion for leave to file the supplemental portions (setting forth the approval in Washington of the Vice Consul's action) was filed on March 18, 1954 [R. 10, 28]. Notice of Motion to Correct the Supplemental Portions (showing the date of the Washington action as being December 18, 1952 [R. 14]) was filed in April 19, 1954 [R. 13-14, 29].

Defendant's Motion to Dismiss the amended complaint on the ground that the court lacked jurisdiction over the subject matter was filed on March 23, 1954 [R. 11, 29]. The court's order allowing the correction of the supplemental portions of the Amended and Supplemental Complaint was made on April 20, 1954 [R. 16, 29; *cf.* R. 22]. Its oral order dismissing the action for lack of jurisdiction was made on April 21, 1954 [R. 17, 29]. The formal written order of dismissal was filed on May 24, 1954 [R. 18, 29]. The court's opinion was filed on June 23, 1954 [R. 18-27, 29]. The opinion is reported at 122 Fed. Supp. 260.

Specification of Errors.

1. The District Court erred in dismissing the action;

2. The District Court erred in ruling that it lacked jurisdiction over the subject matter of the action.

ARGUMENT.

Summary of Argument.

1. It is not necessary to decide whether the original complaint [R. 3-6] stated a cause of action under 8 U. S. C. 903, although plaintiff believes it did;

2. The amended complaint [R. 6-8], filed as a course, no responsive pleading having been served or filed, disregarding the portions supplementary to the date of the filing of the original complaint, relates back to the date of the filing (Rule 15(c), Federal Rules of Civil Procedure), and succinctly spells out all the elements of 8 U. S. C. 903; (1) prior to the filing of suit, plaintiff claimed a right or privilege as a national of the United States (the right or privilege to be registered by the American Vice Consul as a national of the United States living abroad) [R. 7]; (2) prior to filing of suit, he was denied that right (registration) by the Vice Consul and instead the Vice Consul executed as to him a Certificate of the Loss of the Nationality of the United States [R. 7]; (3) upon the ground that plaintiff was not a national of the United States (the Vice Consul ruling that plaintiff had lost his United States citizenship under 8 U. S. C. 801(c), by reason of having served in the Japanese Armed Forces) [R. 7]; (4) plaintiff seeks a declaration that he is a national of the United States [R. 8]; (5) in the District Court of the United States for the district wherein he claims permanent residence [R. 6].

Under 8 U. S. C. 903, nothing more is needed.

3. It is not, therefore, even necessary to consider whether the supplementary portions of the Amended and Supplemental Complaint, which the court allowed to be

filed, supply any missing allegations, because none was missing. There was no provision under 8 U. S. C. 903 (*cf.*, 8 U. S. 1503 (a) and (c) under the 1952 Act), for any exhaustion of administrative remedies. If such were required, however, these remedies were exhausted on December 18, 1952, when the Washington office of the State Department approved the Certificate of the Loss of Nationality which the Vice Consul had previously made. All this occurred before the effective date (December 24, 1952) of the 1952 Act.

4. The fact that the effective date of the 1952 act occurred before plaintiff filed his amended complaint and his motion for leave to file the supplementary portions thereof, is of no moment because the savings clause of the 1952 act preserved plaintiff's right so to do.

I.

The Sufficiency of the Original Complaint Need Not Be Considered Here.

Inasmuch as it was the duty of the Vice Consul to register an American national living abroad (8 C. F. R. 1072), and this was clearly not done [R. 4], it would seem that the requirements of the statute were met even based upon the allegations of the original complaint as filed. (*Cf., Lee Wing Hong v. Dulles,* 214 F. 2d 753, 756, 757 (C. A. 7, 1954) *Chin Ming How v. Dulles,* 118 Fed. Supp. 490, 493 (D. C. S. D. N. Y., 1953).

However, as indicated, this question need not be decided because the amended complaint clearly complied completely with the statute.

II.

The Amended Complaint Complies With 8 U. S. C. 903.

As previously pointed out under the statement of facts, the District Court rendered a written opinion [R. 18-27]. It was made and filed subsequent (June 23, 1953) [R. 27, 29]; to the court's formal written order of dismissal (May 24, 1954) [R. 17, 18, 29]. And, although the court's opinion, even had it been rendered before or concurrently with the order, is not technically part of the record as such (*Brooks v. Brooks Clothing of Calif.,* 5 F. R. D. 14, 17 (D. C. S. D. Cal., 1945); *Bowles v. Dodge,* 141 F. 2d 969, 970 (C. C. A. 9, 1944), it nevertheless may be looked to as indicating the reasoning of the trial court (*Bowles v. Dodge, supra; Takehara v. Dulles,* 205 F. 2d 560, 561 (C. A. 9, 1953)). Upon doing so, we find that the whole rationale of the trial court's reasoning is based upon the erroneous theory that even though there was a denial of the application for registration by the defendant, there was no denial within the meaning of 8 U. S. C. 903 because this action of the defendant was "uncommunicated to the plaintiff prior to the filing of the complaint" [R. 22]. This, despite the fact that the consular officials, charged with the duty of administering 8 U. S. C. 903, considered the denial to have taken place under the statute (whether it occurred when the Certificate of Loss was executed in Japan (November 20, 1954) [R. 7], or when the Washington office approved it (December 18, 1952) [R. 14]) and issued to plaintiff a Certificate of Identity under the statute to enable him to come to the United States for the trial [R. 7]. This interpretation by the defendant is significant in the light of the fact that the consulate officials in Japan are not noted for over zealous-

ness in the granting of Certificates of Identity under the provision of 8 U. S. C. 903 (*cf. Kawaguchi v. Acheson,* 184 F. 2d 310 (C. A. 9, 1950)).

Moreover, when it is considered that 8 U. S. C. 903 is remedial legislation and should therefore be liberally construed (*Furusho v. Acheson,* 94 Fed. Supp. 1021, 1023 (D. C. D. How., 1951), appl. dism.; *cf., Acheson v. Furusho,* 212 F. 2d 284 (C. A. 9, 1954), and *Perkins v. Elg.,* 307 U. S. 325), the error of the court's reasoning becomes even more apparent.

It is difficult to follow the trial court's logic. Certainly there is nothing in 8 U. S. C. 903 which spells out or *requires* the theory of communication. The statute does not call for knowledge of denial. It allows the suit upon their having been a denial. It would seem that the court's proviso calling for communication to the plaintiff is a re-writing of the statute. Courts, of course, have no such power (*Hague v. CIO,* 307 U. S. 496, 518; *United States v. Henning,* 344 U. S. 66, 76; *Pillsbury v. United Engineering Co.,* 342 U. S. 197, 199). All that the statute requires is that "any Department *or* agency *or* executive official thereof" deny the claimed right "upon the ground that (the person) is not a national of the United States." The court indicates that had plaintiff *known* of the Vice Consul's action prior to the filing of the action, it would have held that it had jurisdiction [R. 22]. This is pure formalism. When, on Nevember 20, 1950, the Vice Consul refused to register plaintiff as a national of the United States and instead executed under official seal, as to plaintiff, a Certificate of the Loss of the Nationality of the United States, he effectively denied to plaintiff a right as a national of the United States. And under 8 U. S. C.

903, plaintiff was entitled to file a suit for court declaration at that moment. We submit that no other conclusion is possible and that that conclusion follows from what this court has previously said in *Wong Wing Foo v. Dulles,* 196 F. 2d 120, 122 (C. A. 9, 1952), and what other courts have said in related situations (*Linzalone v. Dulles,* 120 Fed. Supp. 107 (D. C. S. D. N. Y., 1954); *Chin Ming How v. Dulles,* 118 Fed. Supp. 490 (D. C. S. D. N. Y., 1953)).

In *Wada v. Dulles,* No. 14982 (D. C. S. D. Cal. Jan. 13, 1955), the court ruled in its Conclusion of Law No. VII (no opinion was written) that:

> "The execution by the American Vice-Consul at Kobe, on July 12, 1951, of the Certificate of Loss of the Nationality of the United States constituted a denial of a right or privilege to plaintiff as a national and citizen of the United States within the meaning of 8 U. S. C., Sec. 903."

Accord:

> *Miyata v. Dulles,* No. 14872 (D. C. S. D. Cal., Jan. 21, 1955) (Conclusion of Law No. II).

And in the *Wada* case, *supra,* the court held (Conclusion of Law No. IX) that:

> "Plaintiff was denied a right and privilege as a citizen of the United States within the meaning of 8 U. S. C., Section 903, even though prior to the filing of this action, he had not been notified of the loss of his citizenship, or formally denied his application for a passport to the United States."

Communication to the plaintiff adds nothing. The denial takes place the moment the Vice Consul refuses to register plaintiff as a national on the ground, as here, that plaintiff is not a citizen of the United States. While the precise moment when the Vice Consul subjectively made up his mind not to register plaintiff may be difficult to ascertain, there can be no question about the matter when, on November 20, 1952, under official seal the Vice Consul executed as to plaintiff the Certificate of the Loss of the Nationality of the United States on the ground that plaintiff had expatriated himself under 8 U. S. C. 801(c) by reason of his having served in the Japanese Armed Forces [R. 7].

In the *Wong Wing Foo* case (196 F. 2d at 122), this court pointed out that an action under 8 U. S. C. 903 properly lies "where a consul refuses to register a person as a United States national," citing *Acheson v. Kuniyuki* (9 Cir.), 189 F. 2d 741. And this Court (*ibid.*) held that the "section is largely invoked where there has been no administrative proceeding at all."

Accordingly it follows, we submit, that the denial under 8 U. S. C. 903, takes place at the time the Vice Consul refuses to act or at least when he executes the Certificate of Loss, not when plaintiff is told about it. The imparting of information to the plaintiff by the defendant, adds nothing to what he has already done, or refused to do.

III.

The Supplemental Complaint Stated a Claim Under 8 U. S. C. 903.

This feature of the case needs little discussion. As seen, the supplemental portions of the amended and supplemental complaint added, in so far as pertinent here, the fact that the State Department's office in Washington approved, on December 18, 1952, two days after the complaint was filed, the prior denial by the Vice Consul in Japan on November 20, 1952 [R. 7] when he executed the Certificate of Loss and refused to register plaintiff as a national of the United States.

In plaintiff's view, this did not take away the effect of the previous denial nor add to it. The action of the Washington office affirmed the action of the Vice Consul and did not reverse it. But it did no more than that.

In the trial court's view, even if approval by the Department's office in Washington was necessary to constitute a denial (a view, we submit, which is neither in the statute, nor contemplated by it and which is unwarranted from its terms), nevertheless, the court says, the statute was not complied with because it did not occur before the complaint was filed [R. 23]. In the light of the fact that the court did allow the filing of the supplemental portions of the amended and supplemental complaint, we do not understand the court's reasoning on this score. The court's view that the supplemental pleading would not be effective to cure the supposed invalidity or prematurity of the original complaint [R. 22], while in-

correct, would have been more logical had the court refused to allow the filing thereof. Had this been the case, the trial court would have been adopting the minority and less preferable view as to the allowance of amended and supplemental pleadings based on the notion that one cannot amend a non-existent action. This view as a ground for not allowing amended and supplemental pleadings has been thoroughly discredited (See *Hackner v. Guaranty Trust Co.,* 117 F. 2d 95, 98 (C. C. A. 2, 1941),[1] cert. den. 313 U. S. 559; 3 Moore, Fed. Practice 858, 859; concurring opinion in *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.,* 200 F. 2d 876, 879 (C. A. 2, 1952); *Genuth v. National Biscuit Co.,* 81 Fed. Supp. 213 (D. C. S. D. N. Y., 1948);[2] *Porter v. Block,* 156 F. 2d 264 (C. C. A. 4, 1946); *Hillgrove v. Wright Aeronautical Corp.,* 146 F. 2d 621 (C. C. A. 6, 1945).

But the question is not present in this case because the court *did* allow the supplemental pleading to be filed. [R. 16, 29; *cf.,* R. 22.]

Thus we are brought again to what is the crux of the trial court's view as to what constitutes a denial under 8 U. S. C. 903: that the fact of the denial must be communicated to the claimant before there is a denial under that section. The fallacy of that reasoning has been explained above.

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[1]"Defendant's claim that one cannot amend a non-existent action is purely formal, in the light of the wide and flexible content given to the concept of action under the new rules."

[2]"I see no reason why the plaintiffs should not be allowed to file the supplemental complaint despite the fact that the principal complaint is dismissed."

IV.

The Effect of the 1952 Act.

The trial court's discussion of the savings clause of the 1952 Act is likewise predicated upon the erroneous doctrine of communication. This, because if Washington approval was necessary, this approval occurred before the effective date of the 1952 Act, although not communicated to him until after.

The court speaks of the Savings Clause as applying only to "a valid suit, or a valid action" [R. 23]. However, an examination of the clause discloses no such requirement. When Congress intended that the Savings Clause apply only to a "valid" proceeding pending at the time the 1952 was to take effect, it said so. Thus in a portion of the Savings Clause not quoted by the court [R. 23], Congress said:

> "Nothing contained in this Act . . . shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding *which shall be valid at the time this Act shall take effect;* . . ." (Italics added.)

From the absence of the modifying words, italicized above, in the phrase which the court below quoted [R. 23], it is clear that Congress, by its broad Savings Clause, intended no change as to any suit, action or proceeding, civil or criminal, pending at the time the new act took effect. Thus the posture of the case is this (assuming that before there can be a denial under 8 U. S. C. 903,

there must be action in Washington): prior to December 16, 1952, the Vice-Consul took his action; on December 16, 1952 plaintiff filed his complaint; on December 18, 1952, after the complaint was filed, but before the new act took effect, the Washington action occurred. Assuming, unnecessarily we again assert, that this latter was the denial, plaintiff had the right under recognized rules of pleading to ask leave to file the supplemental facts. The suit, (action or proceeding) was certainly "existing" at the time the new act took effect, and by the savings clause, it and the statute under which it was filed was "hereby continued in force and effect." If the savings clause means anything, it means that this right to file the supplemental pleading continued. Otherwise Congress's language that "nothing contained in this Act . . . shall . . . affect any . . . suit, action, or proceedings, civil or criminal" is meaningless.

The Supreme Court has recently said (*De La Rama Steamship Co. v. United States,* 344 U. S. 386, 389):

> "We see no reason why a careful provision of Congress, keeping a repealed statute alive for a precise purpose, should not be respected when doing so will attain exactly that purpose."

Accordingly we are brought back to the central theme of the court's reasoning: that notice of the denial must be communicated to the claimant in Japan before there has been a denial under 8 U. S. C. 903, a concept, we respectfully submit, which has no support in the statute or in reason.

If plaintiff is correct in his argument that under 8 U. S. C. 903 there is a denial the very moment the consulate in Japan refused to register plaintiff and executed the certificate of loss, or, under the supplementary features of the case, the moment the office in Washington approved the consulate's action, the right to file the supplementary pleading and the jurisdiction on the trial court is clear.[3]

Conclusion.

The crux of this case lies in the reasoning of the trial court that before there can be a denial under 8 U. S. C. 903, there must be communication to the plaintiff. We think not. The denial is a fact the moment it is made, whether defendant tells plaintiff about it or not.

The order of dismissal should be set aside and the case permitted to proceed to trial.

Respectfully submitted,

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[3]Although the point need not be argued here, there is authority that under those circumstances, even a new suit, though filed after December 24, 1952, would lie. (See *Lang v. United States,* 133 Fed. 201 (C. C. A. 7, 1904); *De Four v. United States,* 260 Fed. 596 (C. C. A. 9, 1919); *Yucas v. United States,* 283 Fed. 20 (C. C. A. 7, 1922); *Great Northern Railway Co. v. United States,* 208 U. S. 452; *United States v. Reisinger,* 128 U. S. 398; *Quirk v. United States,* 161 F. 2d 138 (C. A. 8, 1947); *Stillman v. United States,* 177 F. 2d 607 (C. A. 9, 1949); *cf. NLRB v. National Garment Co.,* 166 F. 2d 233 (C. C. A. 8, 1949); *De La Rama Steamship Co. v. United States,* 344 U. S. 386; *United States v. Menasche,* 210 F. 2d 209 (C. A. 1, 1954); *Vanish v. Barber,* 211 F. 2d 467 (C. A. 9, 1954); *Ex parte Robles-Rubio,* 119 Fed. Supp. 610 (D. C., N. D. Cal. 1954); *United States ex rel de Luca v. O'Rourke,* 213 F. 2d 759 (C. A. 8, 1954).

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vs.

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Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF PLEADING AND FACTS DISCLOSING JURISDICTION.

Appellee agrees with Appellant's statement of jurisdiction except that the District Court did not have jurisdiction over subject matter under 8 USC Section 903, but had jurisdiction to decide jurisdiction under 8 USC Section 903.

STATEMENT OF THE CASE.

Appellee disagrees with Appellant in the following respects:

(a) There is no evidence in the record that the supplemental portions of the Amended Complaint were allowed to be filed (R. 16, 17, 29) but reference to the Court's written opinion (R. 22) indicates that the Court retroactively contemplated their being allowed.

STATUTES INVOLVED.

In addition to the statutes cited by Appellant (Opening Brief, pages 2, 3) there is involved: 8 USC Section 901:

> *Procedure when diplomatic official believes that person in foreign state has lost American nationality.*
>
> "Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his American nationality under any provision of subchapter IV of this chapter, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates. Oct. 14, 1940, c. 876, Title I, Sub-chap. V, §501, 54 Stat. 1171."
>
> *Section 403(a)(42) of the Immigration and Nationality Act, 1952, (66 Stat. 166 et seq.).*

"Sec. 403(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

(42) Act of October 14, 1940 (54 Stat. 1137)."

FACTS.

Appellee disagrees with Appellant in the following respects:

(a) Application for registration as an American citizen was denied by the Vice Consul on March 20, 1953 (R. 13);

(b) That on December 18, 1952, the Washington office of the Department of State approved the Certificate of Loss of Nationality of the Plaintiff;

(c) That on November 20, 1952, the Vice Consul at Kobe, Japan, may have been acting as an agent for and on behalf of the Defendant Secretary of State (R. 7) but not in the matter of making a decision as to (1) denial of a *right or privilege* of a national or (2) issuance of a Certificate of Loss of Nationality. 8 USC Sections 901 and 903;

(d) That on December 18, 1952, the Washington office of the Department of State may have approved a Certificate of Loss of Nationality but not the denial of a *right or privilege* on the ground that he is not a national of the United States (R. 14). 8 USC Sections 901 and 903;

(e) Nowhere in the *record* is there any evidence that the supplemental portions of the Amended Complaint were allowed to be filed (R. 16-17, 29, but cf. R. 22).

QUESTIONS PRESENTED.

A. Does the Supplemental Amended Complaint state jurisdiction over the subject matter.

B. Does the Amended Complaint state jurisdiction over the subject matter.

C. Does the original Complaint state jurisdiction over the subject matter.

SUMMARY OF ARGUMENT.

1. The Amended, Supplemental, Corrected Complaint (R. 6-8, 14) does not state a claim under 8 USC Section 903. The Amended Complaint and Amended, Supplemental, Complaint do not allege a denial of a right or privilege of a national of the United States on the ground that he is not a national (R. 7, 8, 14) in that no denial is alleged. The record does not show the allowance of supplemental matter (R. 16, 17, 29, but cf. 22). But if it was allowed, a complaint showing lack of jurisdiction at the time of filing cannot be cured by supplemental matter, and allowance or disallowance of filing is therefore immaterial. A Certificate of Loss of Nationality is of itself not a denial of a right or privilege of a national until it is delivered to the applicant: 8 USC Section 901. Section 403 (a) (42) of the 1952 Act (66 Stat. 166 et seq.) repealed 8 USC Section 903; and its savings clause (Section 405) is not broad enough to allow an action under a repealed statute based on events which occurred after

the statute is repealed or to allow the filing of a suit after the repeal date.

2. The Amended Complaint (R. 6-8) does not state a claim or jurisdiction over the subject matter.

3. The original Complaint does not state a claim or jurisdiction over the subject matter.

ARGUMENT.

THE AMENDED, SUPPLEMENTAL, CORRECTED COMPLAINT DOES NOT STATE A CLAIM UNDER 8 USC SECTION 903.

In order that the argument can be consolidated the final version of the Complaint, as propounded by the Appellant, should be considered first. The essential allegations upon which considerable disagreement has manifested itself are as follows:

1. On or about October 17, 1952, Plaintiff applied at the Office of the American Vice-Consul, Kobe, Japan, for registration as a citizen of the United States (R. 7).

2. Said application for registration was denied Plaintiff by said Vice-Consul on the ground that Plaintiff had lost his United States citizenship under 8 USC Section 801(c) by reason of the aforesaid service in the Japanese Armed Forces (R. 7).

3. And instead, on November 20, 1952, said Vice-Consul executed, under his official seal as Vice-Consul of the United States, a Certificate (as to Plaintiff) of the Loss of the Nationality of the United States on the ground aforesaid (R. 7).

4. Said action of the Vice-Consul in Kobe, Japan, was approved by the Washington Office of the Department of State on December 18, 1952 (R. 7, 9, 14).

In this area of the Amended, Supplemental, Corrected Complaint lies all of the issues involved.

Appellant alleges an application for a right or privilege of a national of the United States, the right or privilege to registration as an American citizen living abroad. He further alleges not a denial of this right or privilege but the execution on November 20, 1952, of a Certificate of Loss of Nationality (R. 7), and the approval or issuance of the same in Washington, D.C., on December 18, 1952 (R. 7, 9, 14). 8 USC Section 901.

It is plain that here Appellant has applied for a right or privilege and subsequently been denied that right or privilege on March 20, 1953 (R. 13). In the intervening process between October 17, 1952, and March 20, 1953, several administrative steps were taken:

November 20, 1952: Written opinion and preparation of a Certificate of Loss of Nationality forwarded to Washington Office of the Department of State (R. 7). 8 USC Section 901. 22 CFR 50.3.

December 18, 1952: Receipt of and presumptive telegraphic approval of the Certificate of Loss of Nationality at Washington, D.C. (R. 9, 12, 14).

March 18, 1953: Formal approval of the Certificate of Loss of Nationality by the Washington Office of the Department of State (R. 7, 9, 13).

To begin at the beginning, Appellant asserts a denial by the preparation of a Certificate of Loss of Nationality by the U. S. Consul. This is not a final decision in any sense of the word, it is at most a fact-finding report to the final arbiter in Washington, D.C. (8 USC former Section 901; Act of October 14, 1940, Chapter 876 Title I Subchapter V, Section 501, 54 Stat. 1171).

Title 22 CFR Section 50.3 reads in part as follows:

> "*Certificate of diplomatic or consular officer.*
> Whenever a diplomatic or consular officer of the United States has reason to *believe* that a person while in a foreign country has lost his American nationality under any provision of chapter IV of the Nationality Act of 1940 (54 Stat. 8 U.S.C. 901), he shall certify the facts upon which such *belief* is based to the Department of State in writing on the following form:" (Emphasis supplied).

As can be seen by reading both the statute (8 USC Section 901) and the regulations (22 CFR 50.3) the consul acts on belief. He does not make a decision. Only when he has reason to believe does he find facts to certify to the Department in Washington. This is a far cry from making a final decision. It seems very clear that the action of the Vice-Consul is contemplated both by the statute and by the regulations as nothing more than a fact-finding report. It is certainly not a denial of a right or privilege of a citizen of the United States.

Based upon the above facts the Amended Complaint, as distinguished from the supplemental portions, does

not disclose jurisdiction over the subject matter. There has been no denial. *Dulles v. Lung,* 9 Cir. 1954; 212 F. (2d) 73. Nor have Appellant's administrative remedies been exhausted. *Ling Share Yee, et al. v. Acheson,* 3 Cir. 1954, 214 F. (2d) 4.

To pass from an allegation impossible of performance under the laws, i.e., issuance of a Certificate of Loss of Nationality by the Consul in the first instance, to the alleged approval of the Certificate of Loss of Nationality by the Washington Office of the Department of State on December 18, 1952 (R. 14), we find this action, as it is alleged, took place on the day of receipt of the Certificate of Loss (R. 12). Not to dwell overly long on this surprising state of facts, the Department of State was evidently aroused, for one day, from its alleged delaying tactics (R. 4, 5).

Appellant alleges that here in this situation this approval of the Certificate of Loss is the effective denial of the Application of Registration (R. 7, 9, 14). (Appellant's Brief, page 12).

With this allegation we cannot agree. A Certificate of Loss standing alone is not a denial of a right or privilege of a national of the United States; it is instead, the statement of a fact that the Appellant (in this case) has, because of certain acts, lost his citizenship. We re-emphasize, this is *not* a denial, it is a basis upon which a Consular official may act — in this case, to deny the application for registration or conversely to issue a visa under Section 317(c) of the Nationality Act of 1940. (54 Stat. 1147, 8 USC former Section 717).

In *Wong Wing Foo v. McGrath,* 196 F. (2d) 120, 122, this Court held that testimony taken at a former immigration hearing was not admissible. In the course of the opinion it was stated that "This action is largely invoked where there has been no administrative proceeding at all". This statement is undoubtedly true under the proper circumstances. It may be true where (1) there is no administrative relief available, or (2) where available, the administrative authority refuses to accept and process applications therefor. These circumstances are *not* present here. Appellant applied for registration as an American citizen. This application was accepted, processed, and eventually denied (refused) on March 20, 1953.

Acheson v. Kuniyuki (9th Cir.) 189 F. (2d) 741, cited in support of this proposition, appears from this Court's opinion and the lower Court's opinion, 94 F. Supp. 358, to have no application whatsoever except that by proper application, processing, and decision, the Department of State refused registration. When the instant case was filed the State Department had reached the processing stage only.

The cases of *Wada v. Dulles,* No. 14,982 (DC SD-Calif., Jan. 13, 1955) and *Miyata v. Dulles,* No. 14,872 (DC SD-Calif., Jan. 21, 1955), obviously not available to this writer, appear, from the out of context quotations, to have ignored 8 USC Section 901 which clearly sets forth that no decision can be made by the Consul. His duty is merely to be a fact-finder. There is no final determination on a Certificate of Loss of Nationality

until approved in Washington. *In Re Katsumi Yoshida,* 113 F. Supp. 631.

This action, therefore, again falls within the purview of *Dulles v. Lung, supra,* and *Ling Share Yee, et al. v. Acheson, supra.* The very indication in the record is that the registration as a citizen was refused on March 20, 1953 (R. 13).

ALLOWANCE OF SUPPLEMENTARY MATTER.

It is noted without reference to the propriety of the allowance of the Supplemental Complaint, it is clear that standing as amended, supplemented and corrected, the Appellant's final version of the Complaint does not state a claim under 8 USC Section 903 for the reason that no denial has been made during the life of the remedy, that is, until 12 midnight, December 23, 1952. As of that date the remedy materially changed. Be that as it may, only the Court's written opinion (R. 22) indicates that the supplemental portions were allowed.

Consequently, allowance of supplementary matter in this particular case concerns events which took place prior to the effective date of the present 8 USC Section 1503, December 24, 1952. Actually, the only supplemental event is the alleged approval of the Certificate of Loss on December 18, 1952. And as has been seen before this, neither adds to nor detracts from the fact that there is no denial prior to December 24, 1952, and consequently, the remedy within the narrow confines of 8 USC Section 903 was extinguished and

the even more narrow 8 USC Section 1503 was substituted. *Ling Share Yee, et al. v. Acheson, supra; In Re Katsumi Yoshida, supra.*

A COMPLAINT DEFICIENT ON THE GROUNDS OF JURISDICTION AT THE TIME OF FILING CANNOT BE CURED BY SUPPLEMENTAL MATTER.

This Complaint cannot be supplemented to give the Court jurisdiction. As has been noted earlier in this brief, there appears to be no ground in the record for assuming that the supplemental matter was ever allowed (R. 16, 17, 29). It, however, should be called to the Court's attention that the lower Court's opinion does make reference to this matter (R. 22), however, we are quick to agree with Appellant (Appellant's Brief, page 8) that the opinion, technically speaking, is not part of the record.

We believe that had the supplemental portions of the Amended Complaint been allowed, error would have been committed. Appellant's only possibility of raising a cause of action stems from the alleged effect of the approval of the Certificate of Loss of Nationality on December 18, 1952, subsequent to the filing of this suit.

"Plaintiff cannot avoid the effect of lack of jurisdiction over the original action by alleging a new cause of action subsequently accruing because of later transactions, occurrences or events." *Bonner v. Elizabeth Arden, Inc.,* 177 F. (2d) 703, 705 (2 Cir. 1949). (See also: *Bowles v. Senderowitz,* 65 F. Supp. 548; modified

on other grounds; *Porter v. Senderowitz,* 3 Cir., 158 F. (2d) 435; *Berssenbrugge v. Luce Mfg. Co.,* 30 F. Supp. 101).

CERTIFICATES OF LOSS OF NATIONALITY EFFECT THEREOF NOTIFICATION OF APPELLANT.

Now will be considered the "doctrine of communication" which is persistently attacked throughout Appellant's Brief (Appellant's Brief, pages 8, 9, 10, 11, 13, 14, 15 and 16).

In the instant case it isn't necessary to decide whether the denial or refusal of registration as a citizen of the United States living abroad need be communicated to the Appellant, but only whether the decision in Certificate of Loss of Nationality need be communicated to the Appellant in order that action should become final as the denial of a right or privilege as a national of the United States.

In this connection, written into 8 USC Section 901 is the following:

> "If the report of the diplomatic or consular officer is approved by the Secretary of State . . . the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates."

From this it is clear that Congress contemplated that as a part of the proceeding that notice be given the person involved. A Certificate of Loss of National-

ity is a document which states a fact. The existence of Certificate of Loss of Nationality does not *ipso facto* mean a denial of a right or privilege as a national of the United States. The first opportunity that a denial could occur is when the statute has run its full course. 8 USC Section 901. This means delivery to the applicant. It is at that point, and thereafter, that a denial could appear, but not before. In this case the Consul enters the order by sending it to the person involved. This is when it becomes possible for a denial, if there be any, to become effective and not before.

How can any Complaint be filed in good faith unless, and until Plaintiff has some knowledge of the fact that a right or privilege has been denied to him?

At this point Appellee wishes to call to the attention of the Court the sequence of pleadings, as it existed both here and in *Suda v. Dulles,* No. 14,461 in this Court. In both cases, Complaints were filed in the dark, so to speak, hoping that the facts of the case would eventually come to the rescue of the pleader. In this case, the period from October 17, 1952, the date of the application of registration (R. 7), to December 16, 1952, the date of filing the original Complaint (R. 3-6), would not in any sense constitute the unreasonable delay alleged. The propriety of this type of pleading, under Rule 11 of the Federal Rules of Civil Procedure, has been commented on in *Suda v. Dulles, supra,* and should not in any sense be allowed to pass without drawing the full attention of the Court to it.

EFFECT OF THE 1952 ACT.

To begin with, Section 403(a)(42) of the Immigration and Nationality Act of 1952 repeals the Nationality Act of 1940 and all amendments thereto, which includes the remedy in 8 USC Section 903.

Secondly, Section 405(a) of the Immigration and Nationality Act of 1952 serves as a savings clause. In the instant case it is the first sentence of said section which governs, the first part of which is quoted by Appellant (Appellant's Brief, page 14) and conceded by him to be not applicable, or in the alternative, to support Appellee's contention, particularly those words italicized therein.

Appellant points to the second part of the first sentence as supporting his contention that although a faulty and deficient original Complaint was filed before the 1952 Act became effective, that a new and second Complaint based upon an express denial through the operation of the savings clause, together with supplementary matter, may be filed.

The second portion of the first sentence of Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 166 *et seq*, note to 8 USC Section 1101 provides:

> "(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act

shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes *(sic)*, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Before we delve into the legal consequences of this statute, it will be necessary to pinpoint the rights or privileges involved. Appellant has applied to the Department of State for registration as an American citizen. This wholly administrative procedure is never disturbed by judicial proceeding until and unless for some reason the Department of State refuses said application. When this is done then, and only then, is a remedy by *judicial proceeding* available. Until 12 midnight, December 23, 1952, 8 USC Section 903 was the remedy and it was a specialized remedy. On the above date this remedy by judicial proceeding was extinguished and a new remedy substituted. Section 403(a)(42) of the Immigration and Nationality Act, 1952; 8 USC Section 1503.

Then, under these circumstances Appellant's status, condition, right in the process of acquisition, act, thing, liability, obligation or matter were contiued in force and effect. This much applies to Appellant's rights and privileges under administrative procedure. In this case the right to registration as an American citizen, and Appellant was denied this right or privilege on the ground he was not a national of the United States on March 20, 1953 (R. 13).

But Appellant further states, but not in so many words, that the statutes, or parts of statutes relating to any prosecution, suit, action, or proceedings, civil or criminal, brought or matter civil or criminal, done or existing at the time this Act shall take effect are hereby continued in force and effect under the "Savings Clause."

In the present case, as we have seen *supra,* no jurisdiction over the subject matter was acquired at any time prior to the effective date of the 1952 Act. Consequently, it was impossible at any time to invoke 8 USC Section 903 prior to its expiration. The fact that a suit was filed does not change this basic fact.

As to the statement in footnote 4 (Appellant's Brief, page 16) an examination of Section 405(a) itself precludes any such contention.

> "Nothing contained in this Act, . . . shall be construed to affect the validity of any proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action or proceeding, civil or criminal brought . . . but as to all such prosecutions, suits, actions, proceedings . . . the statutes or parts of statutes repealed by this Act are . . . continued in force and effect."

There is absolutely no mention of the ability to invoke the old remedy after the statute has been repealed.

And although we have no quarrel with the *De La Rama* case (cited in Appellant's Brief, page 15) 344 US 386, 389, there is no application here since the essentials of that savings clause are:

> "and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability."

In that case there was a primary right of action sustained *in futuro* based on the repealed statute. There is no such provision here. There is instead a new remedy substituted here. 8 USC Section 1503.

The case of *U. S. v. Menasche,* 210 F.(2d) 209 (1 Cir. 1954) is distinguished on the ground that there the naturalization proceeding, as a matter of course, culminates in Court action. Accord. *In Re Jocson,* 117 F.Supp. 528 (DC-Hawaii, 1954).

The "Savings Clause" is admittedly broad but it is not broad enough to allow an action under a repealed statute based upon events which occurred after the statute is repealed. *In Re Katsumi Yoshida* (DC-Hawaii, 1953), 113 F.Supp. 631.

THE AMENDED COMPLAINT DOES NOT STATE A JURISDICTION OVER THE SUBJECT MATTER.

As has been noted, *supra,* the Amended Complaint does not state jurisdiction over the subject matter. *Dulles v. Lung, supra.*

THE ORIGINAL COMPLAINT DOES NOT STATE JURISDICTION OVER THE SUBJECT MATTER.

The original Complaint herein (R. 3-6) proceeds on an entirely different ground than the Amended and Supplemental Complaint. Appellant alleges that quite sometime ago Appellant applied for a passport (R. 4); that this nonaction and inexcusable delay are a denial of Appellant's rights and privileges as a United States citizen. (R. 4, 5.)

Let us point out first that the "nonaction and inexcusable delay" took place between October 17, 1952 and December 16, 1952 (R. 6, 7, 12); further, that Appellant does not allege that his rights or privileges were denied on the ground that he was not a national of the United States, and as a matter of interest Appellant actually applied for registration and not a passport. (R. 7, 12.)

Appellant alleges that there was a delay. There is no allegation that the delay was caused on the ground that he was not a national of the United States. It is very possible the delay could have been caused by some other reason.

There is no allegation here that amounts to a denial of a right or privilege on the ground that Appellant is not a national. *Dulles v. Lung, supra.*

CONCLUSION.

The important issues of this case involve the effect of the Consul's action in preparing the Certificate of

Loss, the effect of the Washington office of the Department of State approving the Certificate of Loss, and the problem of whether an original Complaint or Amended Complaint which is deficient on the ground of jurisdiction over the subject matter can be cured by supplementary matter. We think the Consul's action amounts to no more than a fact-finding report. We think the Washington office's approval, admittedly a final decision, is an approval of a document stating a fact, *not* denying a right or privilege. We think that lack of jurisdiction at the time of filing a complaint cannot be cured by supplemental matter.

Dated, Honolulu, T. H.,
March 15, 1955.

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No. 14460

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JUNSO FUJII,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

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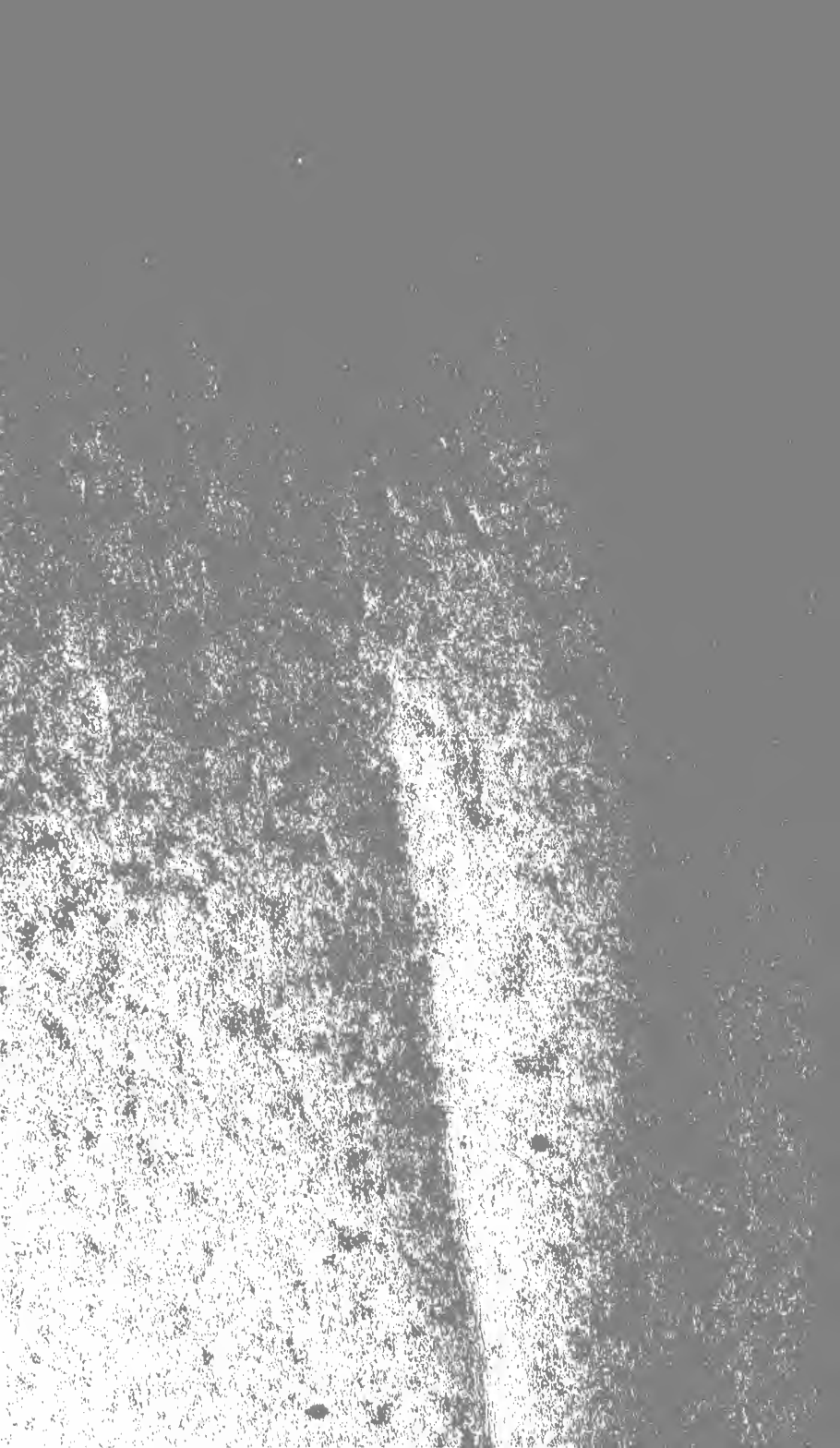

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Appellee.

APPELLANT'S REPLY BRIEF.

Facts.

In his so-called disagreement as to the facts (Appellee's Br. 3), appellee overlooks the fact that the order in this case arose as a result of his filing a motion to dismiss. Accordingly, all the facts alleged by appellant are deemed admitted by appellee and must be accepted, for the purpose of the motion. (*Guessefeldt v. McGrath,* 342 U. S. 308, 310.) Therefore, appellee is bound, for example, by the allegation [R. 7, 14] that the Washington Office of the Department of State approved, on December 18, 1952, the execution by the Vice-Consul in Kobe, Japan

of a Certificate of the Loss of the Nationality of the United States as to appellant on the ground that he had lost his United States citizenship under 8 U. S. C. 801(c) by reason of his service in the Japanese Armed Forces. And while appellee may believe he can prove otherwise, or that plaintiff cannot prove his allegation, this is a matter of fact for the trial.[1] But for the purpose of this case, that is the fact.

The same holds true as to appellee's other disagreements. (Br. 3.)[2]

As to whether the trial court did allow the Supplemental Portions of the Amended Complaint to be filed, we submit, especially in view of the Court's written opinion [R. 22], that no other conclusion is possible.[3]

---

[1]"No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled upon averring a claim, to an opportunity to try to prove it." (*Continental Collieries, Inc. v. Shober, Jr.,* 130 F. 2d 631, 635 [C. C. A. 3, 1942].)

[2]The date, March 20, 1953 in appellee's disagreement (a), page 3 of his brief, must be a typographical error. It probably should read November 20, 1952, or perhaps December 18, 1952.

[3]And, as has been previously pointed out (Op. Br. 13) had he not so allowed, it would have been a clear abuse of discretion. This is particularly so since appellee had permitted appellant to come from Japan to Hawaii for the trial, and since appellant had relied upon this permission, had gone to the expense and effort to make the trip and was ready for trial only to be met by appellee's technical objection on the eve thereof. [R. 16.]

ARGUMENT.

I.

The Amended and Supplemental Complaint Does State A Claim Under 8 U. S. C. 903 (Reply to Appellee's Br. 5-7.)

Appellee's discussion in terms of final decision and exhaustion of administrative remedies is irrelevant to the question here at bar; it disregards the language and meaning of 8 U. S. C. 903. That section says nothing about Certificates of Loss of Nationality or necessity for State Department approval of same, or anything like it. The statute is very plain: if a person claims a right as a national and is denied that right by any Department or agency, or executive official thereof on the ground that he is not a national of the United States, he can file his lawsuit. It means that when he goes to the Consulate and claims the right to registration as an American citizen, if the Consulate refuses or does not so register him, he has been denied that right. It was thus put pithily by the Court in *Wada v. Dulles,* No. 14982 (U. S. D. C. S. D. Cal., oral opinion Dec. 21, 1954):

> "He is denied a right if he isn't treated as a citizen by that consul."

So here, when appellant went to the Consulate at Kobe on October 17, 1952 to be registered as an American citizen, the failure by that Consulate to so register him was the denial of a right; it was that refusal or failure to treat him as a citizen which gave him the right to file suit.

We need not speculate as to when, if at all, prior to the actual execution of the Certificate of Loss, it might be said that this failure or refusal took place. It is sufficient, for the purpose of permitting appellant his day in court that the Vice-Consul, on November 20, 1952, *instead of registering appellant as an American citizen residing in Japan,* did not so do but rather executed the Certificate of Loss, on the ground that appellant was not a national of the United States, and sent it to Washington for approval. Certainly, *at that instant,* has there been a denial on the ground set forth in the statute. For, at least at that instant, and thenceforth, has plaintiff not been treated as a citizen. Otherwise, the consulate would have registered him.[4]

Appellee's suggestion (Br. 7) that in executing and forwarding the Certificate of Loss and not registering appellant, the Vice-Consul made no decision, is, we respectfully submit, double talk. He made the decision to not, and he did not, register appellant as an American citizen on the ground that he was not such. That is sufficient.

22 C. F. R. 50.3 does not change the situation. That is merely a directive to the Consular officer as to a report to be made to Washington when such officer comes into possession of certain facts, regardless of whether or not

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[4]Anyone who is familiar with the operation of American Consulates abroad knows that in most instances, Americans, *e.g.* a soldier's wife and children, are registered and their registrations renewed in a very minimum of time, usually the very day of their appearances at the Consulates.

the person is making a claim as an American national. The regulation has no bearing on the question of whether or when the Consular officer has denied a right to a person before him who claims American Nationality. Nor do *Dulles v. Lung,* 212 F. 2d 73 nor *Ling Share Yee v. Acheson,* 214 F. 2d 4 assist appellee. In the case at bar, as distinguished from the *Lung* case, there is a specific allegation that the Vice Consul refused and did not register appellant precisely on the ground that he was not a national of the United States. And, as distinguished from the *Ling Share Yee* case, there was here no withholding of action pending furnishing by appellant of additional evidence. Here the Vice-Consul had all the evidence he wanted, and based on it, he refused to and did not register appellant. *Cf. Lee Wing Hong v. Dulles,* 214 F. 2d 753, 756 (C. A. 9, 1954) where in response to a similar argument by appellee, the Court said:

> "The essence of all this argument is that the American Consul at Hong Kong did not deny a right or privilege claimed by plaintiff, that is, to have a passport issued, without which they could not come to the United States, but that the Consul's action was only a refusal in his discretion to issue the same because of what he regarded as insufficient proof of identity. We think this is a supercilious argument that it could be made in any case where a citizen, while abroad, was denied a passport so that he might return to this country. Nothing more would be required than that the Consul refuse to issue a passport on the issue of identity. The argument that a refusal to issue a passport because of insufficient proof of identity is not a denial within the meaning

> of the statute of the right or privilege claimed by plaintiffs is without support, either in reason or common sense. . . ."

Appellee is mistaken in attributing (Br. 8) appellant's argument to mean that the approval by the Department of State in Washington is *the* denial. We agree that the Certificate of Loss itself need not necessarily be the denial. The initial denial in this case was the Vice-Consul's refusal to register appellant as an American citizen. This he did, at least by November 20, 1952. We do say, however, that the execution of the Certificate of Loss as well as the approval of the same later in Washington is strong evidence which proves the refusal, and, therefore, the denial.

In the light of the decision in *Lee Wing Hong,* 214 F. 2d 753, *supra,* appellee's efforts (Br. 9) to distinguish this court's language in *Wong Wing Foo v. McGrath,* 196 F. 2d 120 and *Acheson v. Kuniyuki,* 189 F. 2d 741 are of no avail. Nor does appellee's citation of *Re Katsumi Yoshida,* 113 Fed. Supp. 631 assist him. That decision was decided by the same judge who decided the instant case. Moreover, that decision is clearly inconsistent with the recent decision of the United States Supreme Court in *United States v. Menasche,* ..... U. S. ....., 99 L. Ed. (Adv. Op.) 432.

Additionally, the case at bar, being here on a motion to dismiss, the facts being those appearing in appellant's allegations, appellee is incorrect in saying (Br. 10) that the registration was refused on March 20, 1953. At the

most, that is appellee's claim. Appellant alleges otherwise. [November 18, 1952, or, at the lastest, December 18, 1952; R. 7, 14.] He is entitled to his day in court on his claim.

II.

The Supplemental Matter (Reply to Appellee's Br. pp. 10-11.)

If appellee is correct, and as pointed out above, we submit he is not, that action on the Certificate of Loss is not effective until the Department of State approves same in Washington, then even so, appellant's allegation that this was done on December 18, 1952, obviates any disability which may, incorrectly, we submit, be claimed because of the effective date of the Immigration and Nationality Act of 1952. This action by Washington was certainly "during the life of the remedy." (Appellee's Br. 10.)

III.

The Supplemental Portion of the Amended Complaint Was Properly Allowed (Reply to Appellee's Br. pp. 11-12).

As previously pointed out (Op. Br. 13) appellee's argument that the Supplemental Portion of the Amended Complaint alleging the December 18, 1952 action by Washington, should not have been allowed, is an argument of a small minority and has been thoroughly discredited.

IV.

A Citizen Need Not Be First Notified That the Consul Has Refused to Register Him as a Citizen Before He Has Been Denied the Right to Be So Registered (Reply to Appellee's Br. pp. 12-14.)

Appellee reads 8 U. S. C. 903 as though it said the only way a citizen can be denied a right as a citizen is if he receives notification that a Certificate of the Loss of the Nationality of the United States has been issued or approved as to him. Indeed he goes further. He says (Br. 13) that the Certificate must actually be delivered to the applicant.

There is no justification for so narrow a reading of the statute. Appellee overlooks the fact that what is involved here is a denial of a right as an American national, *any* right as such; here, the refusal to register appellant as a United States citizen. The statute requires *only* that there *be* the denial. It does not read, and there is no warrant for interpolating it to read, there must be notification or delivery of a document.

The crucial question is the factual one: has there been a denial. If there has been and there has been here, or at last it is so alleged, that is sufficient.

V.

The 1952 Act (Reply to Appellee's Br. pp. 14-17).

We believe that appellee's argument in this regard is answered by the recent decision of the Supreme Court in *United States v. Menasche,* ..... U. S. ..... 99 L. Ed. (Adv.) 432. We believe this to be so not only because of the actual holding of the case, but also because of the language and rationale of the court's discussion.

It should be pointed out, moreover, that the savings clause of the 1952 Act comes into play here, not because of any "events which occurred after the (1940) statute is repealed" (Appellee's Br. 17), but because of the erroneous view of the trial court [R. 23] that "the Savings Clause presupposes a *valid* suit, or a *valid* action" (Italics added). And that because "the original complaint is a nullity, . . . there is nothing to save."

We submit such an interpretation of the savings clause, especially in view of the *Menasche* case, is entirely unwarranted and amounts to a judicial amendment of the statute. Without again going into the question as to whether the original complaint stated a claim,[5] a "suit, action, or proceeding" had been filed and was "existing at the time" the 1952 Act took effect. As such, under the savings clause, it was entitled to the same treatment as any other suit, action or proceeding. This, because by the savings clause Congress did not merely save from extinction a remedy provided under the repealed statute, "it saved the statute itself." (*De La Rama Steamship Co. v. United States,* 344 U. S. 386, 389.)

---

[5]We submit that the only conceivable defect in the original complaint [R. 3-6] is the absence of an allegation that the delay was occasioned on the ground of the Consulate's view that appellant was not a national of the United States. This absence is easily supplied by amendment, and was so supplied in the amended complaint. [R. 6.] The absence of the allegation certainly does not make the suit a "nullity," as the trial court felt [R. 23], otherwise every suit in which there is a technically defective pleading would be a nullity. To so interpret the office of pleadings would make meaningless Congress's carefully chosen words and efforts in the savings clause.

VI.

The Amended Complaint States a Claim Showing Jurisdiction Over the Subject Matter (Reply to Appellee's Br. p. 17.)

This matter has been covered above.

Conclusion.

The order of dismissal should be set aside and the case permitted to proceed to trial.

Respectfully submitted,

FONG, MIHO, CHOY & CHUCK,
WIRIN, RISSMAN & OKRAND,
Attorneys for Plaintiff and Appellant.

No. 14461.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HITAKA SUDA,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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No. 14461.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HITAKA SUDA,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

Appeal From the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

The issue in this case is similar to that in *Fujii v. Dulles,* No. 14460 in this court. There is a factual difference which should not, but may, be a ground for distinction between the two cases. Appellant's Opening Brief in the *Fujii* case is being filed at the same time as this brief. Counsel for appellant and appellee in both cases are the same. Accordingly, to save the time of the court and counsel, and to save expense, the argument made in the *Fujii* brief will not be repeated here, but is referred to herewith and incorporated herein by reference.[1]

---

[1]Counsel for appellant have been advised by the Clerk of this Court that this procedure is satisfactory.

Statement of Pleadings and Facts Disclosing Jurisdiction.

This action was brought under 8 U. S. C. 903 for a declaration that plaintiff is a national and citizen of the United States. [R. 4.]

The appeal [R. 43] is from an Order of Dismissal made on the ground that at the time suit was filed plaintiff had not been denied a passport or other right or privilege as a cititzen of the United States. [R. 39.] The Order of Dismissal was made not after trial, but in granting defendant's motion to dismiss before trial and after answer filed. [R. 29.]

The District Court had jurisdiction under 8 U. S. C. 903. The Order of Dismissal was filed on June 29, 1954. Notice of Appeal was filed on July 1, 1954. This court has jurisidiction to review under 28 U. S. C. 1291 and 1294(1).

Statement of the Case.

Plaintiff filed the original complaint on December 23, 1952. [R. 6.] On March 18, 1954, plaintiff filed an amended complaint, as of course, under Rule 15(a), Federal Rules of Civil Procedure, no responsive pleading having been served or filed. [R. 10-12.] On March 22, 1954, defendant filed his answer containing only admissions and denials and no other defense. [R. 28.] Thereafter, on April 23, 1954, defendant filed a motion to dismiss on two grounds: (1) under Rule 12(b)(6), F. R. C. P. for failure to state a claim upon which relief can be granted, and (2) under Rule 12(b)(1), for lack of jurisdiction over the subject matter.

Statute Involved.

8 U. S. C. 903 provides in pertinent part:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person . . . may institute an action against the head of such Department or agency in the . . . district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

Facts.

There is no question in this case as to the right of plaintiff to have filed his amended complaint. The pertinent facts alleged in the amended complaint, deemed admitted by the motion to dismiss, are these.

Plaintiff was born in Hawaii on August 9, 1909. [R. 10.] And, therefore, he was born a citizen of the United States. (14th Amend. to U. S. Const.)

On or about November 4, 1952, plaintiff applied at the office of the American Vice-Consul in Kobe, Japan, for a passport to return to the United States as a citizen thereof. [R. 10.]

Said application for passport was denied plaintiff by the Vice-Consul on the ground that plaintiff had lost his United States citizenship under 8 U. S. C. 801(c) by reason of plaintiff having served in the Japanese Armed Forces, and instead, on November 25, 1952, the Vice-Consul, under his official seal as Vice-Consul of the United States, executed as to plaintiff a Certificate of the Loss of the Nationality of the United States on the same ground. [R. 11.]

This action by the Vice-Consul was approved by the Washington Office of the Department of State on December 18, 1952. [R. 11.]

Plaintiff claims Hawaii as his permanent residence. [R. 10.]

Plaintiff prayed for judgment that he is a national of the United States. [R. 11.]

In the face of these allegations, the court dismissed the action. [R. 39.]

Specification of Errors.

1. The court erred in dismissing the action;

2. The complaint stated a claim upon which relief can be granted;

3. The court had jurisdiction over the subject matter.

Argument.

No summary of argument is being submitted because the Argument itself is short.

Unlike the *Fujii* case, above referred to, the action of the Washington office of the Department of State was completed (December 18, 1952) [R. 11] before the original complaint was filed. (December 23, 1952.) [R. 6.] Accordingly, under Rule 15(c), F. R. C. P., all the allegations of the amended complaint speak as of the date of the filing of the original complaint, December 23, 1952.

The District Court rendered an oral opinion in which it explained its reasoning. [R. 35-37.] As in the *Fujii* case, the gist of its argument is found in these words. [R. 36-37]:

". . . There is no allegation that the Certificate of Loss of Nationality dated November 25, 1952, approved by the Department of State December 18, 1952, was communicated to the plaintiff within the life of the statute sought to here by (*sic*) invoked.

". . . The word concerning the issuance of the Certificate of Loss of Nationality has to be clearcut and unambiguous and communicated officially to the plaintiff."

The fallacy of this requirement, and the lack of authority in the court to add to and amend the statute, has been previously briefed in the *Fujii* brief.

One further observation by the court requires comment here. The court said [R. 36]:

"Paragraph (IV of the amended complaint) lacks a definitive declaration of the time when the passport application was denied."

But there is no requirement, either in 8 U. S. C. 903 or in the rules of pleading which require a definite date to be set out.[2]

---

[2]All that the complaint need show is (1) a short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and plain statement showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief to which he deems himself entitled. (Rule 8(a), FRCP.) We do not burden the court with citations for such basic propositions under the new rules as: it is proper to plead conclusions, the complaint need only give fair notice to the opposite party of the nature of the claim, ultimate facts and details of evidence need not be shown, all doubts and ambiguities must be resolved in favor of the claim attempted to be stated, upon a motion to dismiss the court must treat every properly pleaded allegation of fact as true.

In this complaint in alleging that the Vice-Consul denied plaintiff's application for passport, plaintiff practically followed the language of the statute. This is sufficient. (*Card v. Elmer C. Brewer, Inc.*, 42 Fed. Supp. 701 (D. C. Or., 1941); *Securities and Exchange Commission v. Timetrust*, 28 Fed. Supp. 34, 42 (D. C. N. D. Cal., 1939).

The amended complaint spoke as of December 23, 1952 and prior thereto. Thus, the pleading stated that prior to December 23, 1952, November 4, 1952, to be exact [R. 10] the plaintiff applied at the office of the American Vice-Consul in Kobe, Japan for a passport to return to the United States [R. 10] and that "said application *was denied* plaintiff by said Vice-Consul on the ground that plaintiff lost his United States citizenship under 8 U. S. C. 801(c)." (Italics added.) This alone was enough to state a claim under 8 U. S. C. 903. (*Wong Wing Foo v. Dulles,* 196 F. 2d 120, 122 (C. A. 9, 1952).)

It is manifest that the American Consular officers in Japan considered the requirements of 8 U. S. C. 903 to have been met. They issued to plaintiff a Certificate of Identity under the statute to come to the United States, which plaintiff did and was ready for trial. [R. 15, 17, 19, 21, 24, 27.] And it is also manifest that the Washington office of the Department of State, as well as of the Department of Justice, never questioned the correctness of the consular officers having done so. [R. 20, 22, 23, 26.]

Accordingly, there was no basis for the court's dismissing the case.

Conclusion.

The order of dismissal should be set aside and the case permitted to go to trial.

Respectfully submitted,

Fong, Miho, Choy & Chuck,
Wirin, Rissman and Okrand,
Attorneys for Plaintiff and Appellant.

No. 14,461

IN THE

United States Court of Appeals

For the Ninth Circuit

HITAKA SUDA,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
Northern District of California,

Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,461

IN THE

United States Court of Appeals

For the Ninth Circuit

HITAKA SUDA,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,

Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT.

The issues in this case are similar to those in *Fujii v. Dulles,* No. 14460 in this Court, with one exception; that is, the issue of supplementary matter present in the *Fujii* case is not present here. Appellee's Brief in *Fujii* is being filed at the same time as this Brief. Counsel for Appellant and Appellee are the same in both cases. To save time of Court and counsel, and to save expense, the argument made in the *Fujii* brief will not be repeated but is referred to herewith and incorporated herein by reference.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The Appellee agrees with Appellant's statement of jurisdiction except that the District Court did not have jurisdiction over the subject matter under 8 USC Section 903, but had jurisdiction to decide jurisdiction under 8 USC Section 903.

STATEMENT OF THE CASE.

Appellee agrees with Appellant's statement of the case.

STATUTES INVOLVED.

In addition to the statute cited by Appellant (Opening Brief, page 3), there is involved: 8 USC Section 901:

> "*Procedure when diplomatic official believes that person in foreign state has lost American nationality.* 'Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his American nationality under any provision of subchapter IV of this chapter, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations to be prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Department of Justice, for its information, and the diplomatic or consular office in which the report was made

shall be directed to forward a copy of the certificate to the person to whom it relates. Oct. 14, 1940, c876, Title I, sub-chap. V, § 501, 54 Stat. 1171.'

"Section 403(a)(42) of the Immigration and Nationality Act, 1952, (66 Stat. 166 et seq.)

"Sec. 403(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

(42) Act of October 14, 1940 (54 Stat. 1137)"

FACTS.

Appellee disagrees with Appellant in the following aspects:

(a) There is no allegation of denial of the passport applied for in the Amended Complaint and/or the denial of a right or privilege of a national of the United States on the ground that he is not a national. (R. 10-12);

(b) On December 18, 1952, the Washington Office of the Department of State approved the Certificate of Loss of Nationality of the Appellant. (R. 11);

(c) That on November 25, 1952 the Vice-Consul at Kobe, Japan may have been acting as an agent for and on behalf of Defendant, Secretary of State (R. 11) but not in the matter of making a decision as to (1) denial of a right or privilege of a national, or (2) issuance of a Certificate of Loss of Nationality, 8 USC Sections 901, 903;

(d) That on December 18, 1952 the Washington Office of the Department of State may have approved a Certificate of Loss of Nationality (R. 11) but not the denial of a right or privilege on the ground that he is not a national of the United States. 8 USC Sections 901, 903.

ARGUMENT.

The argument itself being short, no summary of argument is felt to be necessary.

As has been noted *supra,* in the *Fujii* case, there is one additional element present. The Complaint there was filed before the approval of the Certificate of Loss of Nationality, whereas here, the Certificate of Loss was issued by the Washington Office prior to the filing of the Complaint.

As has been previously briefed in *Fujii,* this element should make no difference at all. As has been stated, a Certificate of Loss of Nationality is a document which states a fact. The existence of Certificate of Loss does not *ipso facto* mean a denial of a right or privilege as a national of the United States. The first opportunity that a denial could occur is when the statute has run its full course. 8 USC Section 901. This means delivery to the applicant. It is at that point, and thereafter, that a denial could appear, but not before.

It appears necessary again to draw into sharp focus the difference between a denial and a Certificate of

Loss of Nationality. A denial states that a claimed right or privilege has been denied. A Certificate of Loss states a fact, and only after delivery of this Certificate could circumstances, occurrences and events happen which might constitute a denial.

Appellant states that the words of the statute were followed, consequently, the Complaint is sufficient. This broad statement is undoubtedly true generally, but here, at least two considerations become important: (1) The statute was repealed at the end of the day that the Complaint was filed, Immigration and Nationality Act, 1952. Consequently, the date of the denial becomes very important; and (2) The unequivocal statement of denial (R. 11) is not only watered down but completely nullified by the modifying statements as to what constituted the denial. (R. 11.)

Appellant again alludes to the fact that the preparation of the Certificate of Loss of Nationality by the Vice-Consul is a denial of a right or privilege. This is a completely fallacious argument in view of the provisions of 8 USC Section 901.

Further, Appellant cites with approval *Wong Wing Foo v. McGrath,* 196 F. 2d 120, 122. This case, as has been noted before, stands for an entirely different principle and is not applicable here.

At this point Appellee wishes to call to the attention of the Court the sequence of pleadings as it existed both here and in the *Fujii* case. In both cases Complaints were filed in the dark, so to speak, hoping

that the facts of the case would eventually come to the rescue of the pleader. The period from November 4, 1952, the date of the application for a passport, to December 23, 1952, the date of filing the original Complaint, would not in any sense constitute the unreasonable delay alleged. The propriety of this type of pleading, under Rule 11, Federal Rules of Civil Procedure, has been commented on in this case (R. 35) and should not in any sense be allowed to pass without drawing the full attention of the Court to it.

CONCLUSION.

As in the *Fujii* case, there is no allegation of a denial of a right or privilege of a national of the United States. The Amended Complaint did not state jurisdiction over the subject matter and was properly dismissed.

Dated, Honolulu, Territory of Hawaii,
March 15, 1955.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,
United States Attorney,
Northern District of California,

Attorneys for Appellee.

No. 14463

United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, Respondents.

Transcript of Record

On Petition to Enforce an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—10-26-54

No. 14463

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, Respondents.

Transcript of Record

On Petition to Enforce an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—10-25-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
National Labor Relations Board

AMENDED CHARGE AGAINST EMPLOYER

Case No. 19-CA-834. Date Filed 6-25-53. Amended 7-20-53. Compliance Status Checked by 12-31-53 nm.

* * * * *

1. Employer against whom charge is brought: Scherrer and Davisson Logging Company, Granite Falls, Washington.

Number of workers employed: 25.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

On or about March 1, 1953, Alex Cook applied for a job with Scherrer and Davisson Logging Company, Granite Falls, Washington, and was told he would be employed when the Company started logging in the Spring. On or about May 6, 1953, upon inquiry as to why he, Alex Cook, had not been called, he was told upon questioning by officers of the Company that he was not hired because of his past union activities. By this and other acts, the Company discriminated against Alex Cook all in violation of Section 8 (a) (1) and (3) of the Act.

3. Full name of labor organization, including

local name and number, or person filing charge: International Woodworkers of America, Local 23-93.

4. Address: Box 218, Sultan, Washington. Telephone No.: Office 2122, Home 3214.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: International Woodworkers of America, C.I.O.

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By VERN CASTLE,
Business Agent

Date: 7-16-1953.

GENERAL COUNSEL'S EXHIBIT No. 1-F

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-834

In the Matter of PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, doing business as SCHERRER AND DAVISSON LOGGING COMPANY and INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 23-93.

COMPLAINT

It having been charged by International Woodworkers of America, Local 23-93, affiliated with In-

ternational Woodworkers of America, CIO, that Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, a partnership, doing business as Scherrer and Davisson Logging Company, Granite Falls, Washington, hereinafter called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the Labor-Management Relations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director of the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this complaint and alleges as follows:

I.

Respondent is, and at all times material herein has been, a partnership composed of Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, each of Granite Falls, Washington, doing business under the name of Scherrer and Davisson Logging Company, and is now, and at all times material herein has been, continuously engaged in the cutting, falling, and skid of timber in the Sultan, Washington, area. Respondent has its principal place of business in Granite Falls, Washington, hereinafter referred to as the Granite Falls Operation.

II.

Respondent, in the course and conduct of its business operations at Granite Falls, Washington,

causes and has continuously caused a substantial amount of cut timber to be sold to Scott Paper Company, a company which operates in interstate commerce. The value of the cut timber sold to Scott Paper Company exceeds $150,000 annually.

III.

Respondent is, and at all times material herein has been, an employer within the meaning of Section 2, subsection (2) of the Act.

IV.

Respondent is, and at all times material herein has been, engaged in commerce within the meaning of the Act.

V.

International Woodworkers of America, Local 29-93, affiliated with International Woodworkers of America, CIO, hereinafter referred to as the Union, is a labor organization within the meaning of the Act.

VI.

Respondent, while engaged in the operations described above in paragraphs I, II, III and IV, by its officers and agents, on or about May 6, 1953, refused to employ Alex Cook as an employee, and at all times since said date it has refused, and does now refuse, to employ Alex Cook because said Alex Cook engaged in Union activities and concerted activities for the purposes of collective bargaining or other mutual aid or protection.

VII.

Respondent, by all the acts and conduct described in paragraph VI, above, did interfere with, restrain and coerce its employees, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8, subsection (a) (1) of the Act.

VIII.

By the acts described in paragraph VI, above, and for reasons therein set forth, Respondent did discriminate in regard to hire or tenure of employment of Alex Cook, named therein, and thereby has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8, subsection (a) (3) of the Act.

IX.

The activities of Respondent, as set forth in paragraphs VI, VII, and VIII, above, occurring in connection with the operations of Respondent, as described above in paragraphs I, II, III and IV, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

X.

The aforesaid acts of Respondent, as set forth and described in paragraphs VI, VII and VIII, above, constitute unfair labor practices within the

meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 7th day of August, 1953, issues this Complaint against Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, a partnership, doing business as Scherrer and Davisson Logging Company, the Respondent herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19 407 U.S. Court House Seattle, Wash.

GENERAL COUNSEL'S EXHIBIT No. 1-L

[Title of Board and Cause.]

ANSWER

Comes now the Employer and for answer to the complaint herein admits, denies and alleges as follows:

I.

The Employer admits the allegations in Paragraph I.

II.

The Employer admits the allegations of Paragraph II except the Employer denies that it sold timber to Scott Paper Company, but states that the Employer herein was under contract to log timber belonging to Scott Paper Company. That the title to said timber and logs remained in Scott

Paper Company. The value of services rendered by the Employer herein in 1952 was between $105,000.00 and $110,000.00.

III.

Employer admits the allegations in Paragraph III, IV and V of the complaint.

IV.

Employer denies the allegations of Paragraphs VI, VII, VIII, IX and X of the complaint.

Wherefore, having fully answered the complaint herein, the Employer prays that the complaint be dismissed, and that the complainant and general counsel take nothing by reason of their complaint.

/s/ PATTERSON, MAXWELL & JONES,
Attorneys for Employer.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Howard A. McIntyre, Esq., for the General Counsel.

R. W. Maxwell, Esq., and R. M. Oswald, Esq., Patterson, Maxwell & Jones, of Seattle, Wash., for the Respondent.

Mr. Vern Castle, of Sultan, Wash., for the Union.

Before: Wallace E. Royster, Trial Examiner.

Upon charges filed by International Woodworkers of America, Local 23-93, affiliated with International Woodworkers of America, CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Nineteenth Region, issued his complaint dated August 7, 1953, against Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, doing business as Scherrer and Davisson Logging Company, herein called Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act.

In respect to unfair labor practices, the complaint alleges that on or about May 6, 1953, the Respondents refused to employ Alex Cook because of Cook's Union and concerted activities.

Respondents' answer denies the commission of unfair labor practices.

Pursuant to notice, a hearing was held before the undersigned in Everett, Washington, on October 8, 1953. All parties were represented, were afforded opportunity to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. A motion by counsel for the Respondents to dismiss the complaint upon which ruling was reserved at the close of the hearing, is disposed of

by the findings, conclusions, and recommendations below.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondents.

Respondents constitute a partnership with a principal place of business in Granite Falls, Washington. As contract loggers for Scott Paper Company, the Respondents in 1952 cut approximately seven and a half to eight million feet of logs. To the date of hearing in 1953, they had cut approximately three and a half million feet all for Scott Paper Company. All of the timber cut was converted by Scott Paper Company into products moving in interstate commerce. The value of Respondents' services in 1952 to the Scott Paper Company approximated $105,000. I find that the operations of Respondents affect commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organization involved.

International Woodworkers of America, Local 23-93, is a labor organization affiliated with the International Woodworkers of America, CIO, and admits employees of the Respondents to membership.

III. The unfair labor practices.

For the past several years, Alex Cook has been

employed in the Granite Falls, Washington area as a power saw operator and has worked in that capacity for the WRW Logging Company and more recently for the Wilmac Logging Company. A Mr. Mackie is described in the testimony as one of the owners of Wilmac. Oscar Scherrer, one of the respondents, is the husband of Mrs. Mackie's daughter. Two of Mrs. Mackie's sons operate WRW.

Cook is a member of the Union, vice-president of its Granite Falls district, and, while employed at Wilmac, was the Union's shop steward. In the Spring of 1952, the employees of WRW and Wilmac went on strike. Sometime after the strike ended, another strike, apparently for different objectives took place at the two operations. Cook was a striker on both occasions. The second strike lasted for 10 or 11 weeks and the strikers returned to work only 18 days before the ending of the 1952 logging season. Cook testified that he has since retained his position on Wilmac's seniority roster and that he, presumably, will be recalled to work there when employees of comparable seniority are reached.

In early March of 1953, Cook went to the home of William Davisson and asked Davisson for work when the latter began his logging operations that season. According to Cook, Davisson answered that he would need a number of men but would not provide transportation from Granite Falls to the cutting operation near Sultan, about 50 miles away. Cook replied, he testified, that he would drive his

own car to work and asked Davisson to let him know when a job developed. Davisson testified that he told Cook on this occasion that he would need a number of men, that he would attempt to hire all that he could from the Sultan area, and that all who had not worked for him before would have to supply their own transportation. To Cook's request that he be notified when work was available, Davisson answered "O.K."

Delbert Rawlins, also a member of the Union, in 1952 worked for WRW and was one of the strikers during the Spring and Fall of that year. He too, in March or April in 1953 applied to Davisson for work. In 1951 and for a few days in 1952, Rawlins had worked for the Respondents. On the occasion of his application, Davisson told Rawlins that some men would be needed. Davisson testified that he told Rawlins that the latter would have to sever his connection with WRW where he was in lay-off status and that Rawlins agreed to do so. In early April, according to Rawlins, Davisson came to his home and said that Rawlins could not be hired "because of the Union activity, because of that strike." Davisson explained, Rawlins testified, that Oscar Sherrer and Mr. Mackie insisted that Rawlins not be hired; that Davisson, personally, would like to have him as an employee. Still according to Rawlins, Davisson said he would take up the matter further with his partners, would try to persuade them to permit Rawlins' hire, and that it appeared as if "they" were trying to starve Rawlins and Cook "out."

In late April, Cook applied for and received a State permit to log on his own property and he and Rawlins purchased a donkey engine to be used in the logging. At about the same time as this equipment was acquired Rawlins spoke again to Davisson about a job and was told, he testified, that Scherrer had withdrawn his objection; that Rawlins would be hired. Shortly thereafter Rawlins notified Davisson that he could not take the job as long as Cook remained unemployed for the latter could not handle the logging on which they were engaged alone.

Rawlins and Cook testified, that in early May, on the same occasion when Rawlins was offered employment, Cook renewed his application to Davisson. Davisson answered that he had, as yet, no need for Cook. Cook asked if "the trail at the Wilmac, if they didn't have something to do with it."[1] Davisson answered, according to Cook, "That is the whole damn thing." Davisson denied that any such conversation took place and denied that Cook ever spoke to him about employment subsequent to the March application.

Cook and Rawlins ocupied themselves to an extent not shown in the record in logging the former's land. The Respondents assembled a crew, some of them new employees living near Granite Falls, and got on with their cutting. In June, Davisson asked

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[1] "Trail" may be an erroneous transcription of trouble. My notes taken at the hearing so indicate.

Vernon Castle, the Union's business agent, if he knew of any power saw operators who were seeking employment. Castle, then apparently being unaware of Cook's applications, said that he knew of none.

Fred Roberts, Cook's brother-in-law, testified that in May Davisson told him that he would like to hire Cook but that his partners would not permit it. Shortly thereafter, Davisson hired Roberts. About a week after his employment began, according to Roberts, Oscar Scherrer remarked that he would not hire Cook because Cook was too active in the Union. Scherrer went on to express the fear that Cook would foment a strike among the crew and the belief that Cook was an instigator of other strikes that had occurred.

Davisson denied that any consideration of Union activity came into play regarding Cook's application for employment and denied having any conversation with Rawlins to the effect that the Respondents or any of them were trying to retaliate against Cook in any respect. Davisson explained that he did not want to hire Cook because he did did not wish to provide transportation from Granite Falls to Sultan for any more employees and because of an understanding among the Respondents, WRW and Wilmac that none would hire employees of the other. Davisson denied telling Roberts that his partners objected to Cook's hire.

Scherrer, too, denied that he opposed Cook's hire for any reason connected with Union or concerted

activity and firmly denied that he at anytime told Roberts of any reason for Cook's failure to be employed.

Counsel for the Respondents points out the unlikelihood of any Union animus coming into play in Respondents' hiring practices in view of the fact that Scherrer and Davisson both have been members of the Union and deal with it as the representative of their employees. It is also suggested that Roberts' testimony should be rejected first, because of the relationship existing between him and Cook, and second, because of the utter improbability that Scherrer would make such admissions to Cook's relative. Finally, it is urged, Cook did not seek or desire employment after getting the permit to log his land.

I have considered the argument and the factual circumstances to which it is addressed but I find the testimony of the General Counsel's witnesses to be convincing. I am persuaded that Cook's strike activity did engender resentment and a disposition to retaliate in some quarter and that influence was brought to bear upon the Respondents to refuse him employment. It is obvious that Davisson was an unwilling participant in this plan; thus his admission to Cook and Rawlins that Wilmac had something to do with Cook's inability to get on Respondents' payroll and his exculpatory explanation to Roberts that only his partners blocked Cook's hire. I agree that only an indiscreet individual will confess a wrong-doing to a relative of

the victim but I am sure that Scherrer did just that to Roberts and I credit the latter's testimony in that connection. I find that Cook made a bona fide application for employment to Davisson in March and in May; that Cook's residence in Granite Falls constituted no obstacle to his hire as others from that area were hired; that Respondents in May had need for employees with Cook's qualifications and experience; and that Cook was not employed because of his participation in strike activity in the past. I find that Cook did not remove himself from the labor market by logging his own land. His explanation that he engaged in this only when it appeared that he would not get other employment and intended to log for himself only at times when he was not on a payroll is reasonable and is accepted.

By refusing to hire Cook because of his participation in strike activity the Respondents discouraged membership in a labor organization and thus violated Section 8 (a) (3) of the Act.

By refusing employment to Cook because of his participation in strike activity, the Respondents interfered with, restrained, and coerced Cook in the exercise of rights guaranteed in Section 7 of the Act and thereby have violated Section 8 (a) (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents set forth in

Section III occurring in connection with their operations set forth in Section I, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy.

Having found that the Respondents have engaged in unfair labor practices it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Whether the failure to hire Cook be regarded as discrimination cognizable under Section 8 (a) (3) of the Act, or interference, restraint, and coercion under Section 8 (a) (1), or both, an offer of employment and compensation for lost earnings is the appropriate remedy. It will be recommended therefore, that the Respondents offer immediate employment as a power saw operator to Cook. If Respondents' 1953 operations have ended, Cook's name shall be added to the list for recall in the Spring of 1954 in that position which it would have occupied had he been hired in March, April, or May of 1953 absent discrimination. Cook shall be made whole for any loss of earnings by payment to him of that sum of money he would have earned in employment during 1953 with the Respondents less his net earnings during that period. I do not pass upon the question of Cook's earnings in logging his own land.

The record suggests that Cook planned to do this logging in off seasons or when for economic reasons other employment was not to be had. If, because of the unfair labor practice of the Respondents, he has lost this economic cushion it may be that Respondents are not entitled to set off his earnings therefrom.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. International Woodworkers of America, Local 23-93, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire of Alex Cook the Respondents have engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By such discrimination, the Respondents have interfered with, restrained, and coerced Cook in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact

and conclusions of law, and upon the entire record in the case, I recommend that Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, doing business as Scherrer and Davisson Logging Company, their agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, Local 23-93 or discouraging concerted activity for mutual aid or protection by discriminating in regard to the hire of any individual.

(b) By such discrimination or in any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Woodworkers of America, Local 23-93, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer immediate employment as a power saw

operator to Alex Cook or, if 1953 operations have ceased, place him on a list for recall in 1954 in that position. Cook's standing on such list is to be as if he had been hired in 1953 when his services were required.

(b) Make Alex Cook whole for any loss of earnings in the manner set forth in this report in that section entitled "the remedy";

(c) Post at their operation copies of the notice attached here as an appendix. Copies of such notice to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall after being signed by the Respondents or their duly authorized representative, be posted by the Respondents immediately upon receipt thereof or, if 1953 operations have ceased, within 10 days after the beginning of 1954 operations, and maintained by them for sixty (60) consecutive days thereafter in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondents to insure that such notices are not altered, defaced, or covered by other material.

(d) Notify the said Regional Director in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps are being taken in compliance herewith.

It is further recommended that, unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order, the Respondents notify the Regional Director in

writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them to take such action.

Dated this 20th day of November 1953.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

APPENDIX

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Woodworkers of America, Local 23-93, or in any other labor organization, or discourage any individual from engaging in concerted activities for mutual aid or protection by refusing to hire such individual, or by discriminating in any manner in regard to hire, or tenure of employment, or any term of condition of employment.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protec-

tion, or to refrain from any or all such activity except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will offer employment to Alex Cook and make him whole for any loss of earnings suffered.

Dated .....

SCHERRER AND DAVISSON
LOGGING COMPANY
(Employer)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by other material.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-834

In the Matter of PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, doing business as SCHERRER AND DAVISSON LOGGING COMPANY and INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 23-93.

DECISION AND ORDER

On November 20, 1953, Trial Examiner Wallace E. Royster issued his Intermediate Report in the

above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief,[1] and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the following additions and modifications:

We agree with the Trial Examiner's conclusion that the Respondent discriminatorily refused to hire Alex Cook. However, we note certain factual omissions from the Intermediate Report. These are: (1) Mrs. William Davisson testified without direct

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[1] In their brief the Respondents contend, among other things, that there is no evidence in the record to support the Trial Examiner's 8 (a) (3) finding that failure to hire Cook discouraged membership in the Union. It is true that there is no specific evidence in the record to show discouragement. However, in the recent Radio Officers' case, the Supreme Court held that the Board has power to draw such an inference. Like the Trial Examiner, we find that the Respondents' discrimination against Cook warrants an inference, which we make, that the Respondents thereby discouraged membership in the Union. Radio Officers' Union of Commercial Telegraphers Union. A.F.L. vs. N.L.R.B., 74 Sup. Ct. 323, 33 LRRM 2417, 2429-2430.

contradiction that Cook was not in Rawlins' car when, according to the testimony of Cook and Rawlins, Cook made his second application for employment; (2) Vern Castle, the Union business agent, testified that Respondent William Davisson had said to him in June 1953 that Cook was a good man, that he (Davisson) would like to hire Cook, but that there was no room for Cook on the "crummie," and that he (Davisson) did not want to hire any more men from Granite Falls because there wasn't any more room on the "crummie;" and (3) the Respondents hired six employees after May 6, 1953, five of whom lived in the vicinity of Granite Falls: the record is silent as to how two of the employees who lived in Granite Falls were transported to Sultan; three drove from Granite Falls to Sultan; and the sixth employee lived in the Sultan area and the Respondents hauled him from there to the logging operations.

The additional findings we have here noted do not, however, affect our agreement with the Trial Examiner's resolution of the issues, or our agreement with his conclusionary findings.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Phillip Davisson, William Davisson, Oscar Scherrer, and Warner Scherrer, doing business as Scherrer and Davisson Log-

ging Company, in Granite Falls, Washington, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Woodworkers of America, Local 23-93, by refusing to hire any individual, and from discouraging concerted activity for mutual aid or protection by discriminating in regard to the hire of any individual.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Woodworkers of America, Local 23-93, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer immediate employment as a power saw operator to Alex Cook or, if logging operations are currently not in progress, place him on a list for recall in that position during the 1954 logging season. Cook's seniority standing on such list is to be as if he had been hired in 1953 when his services were required.

(b) Make Alex Cook whole for any loss of earn-

ings in the manner set forth in the section of the Intermediate Report entitled "The Remedy".

(c) Post *as* their logging operations copies of the notice attached hereto as an Appendix.[2] Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall after being signed by the Respondents or their duly authorized representative, be posted by the Respondents immediately upon receipt thereof or, if operations are currently not in progress, within ten days after the beginning of 1954 operations, and be maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondents to insure that such notices are not altered, defaced, or covered by other material.

(d) Notify the said Regional Director in writing within ten (10) days from the date of this Order what steps they have taken to comply herewith.

Dated, Washington, D. C., April 22, 1954.

GUY FARMER, Chairman.
ABE MURDOCK, Member.
IVAR H. PETERSON, Member.
PHILIP RAY RODGERS, Member.
[Seal] NATIONAL LABOR RELATIONS BOARD

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[2] In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted in the notice before the words, "Decision and Order" the words, "Decree of the United States Court of Appeals Enforcing."

APPENDIX

Notice to All Employees: Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Woodworkers of America, Local 23-93, or in any other labor organization; and we will not discourage any individual from engaging in concerted activities for mutual aid or protection by refusing to hire such individual, or by discriminating in any manner in regard to hire, or tenure of employment, or any term or condition of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activity, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will offer employment to Alex Cook and

make him whole for any loss of earnings suffered.

Dated .....

SCHERRER AND DAVISSON
LOGGING COMPANY
(Employer)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by other material.

In the United States Court of Appeals
For the Ninth Circuit

No. 14463

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER, and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Rela-

tions Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, d/b/a Scherrer and Davisson Logging Company and International Woodworkers of America, Local 29-93," the same being known as Case No. 19-CA-834 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Wallace E. Royster, Trial Examiner for the National Labor Relations Board dated October 8, 1953.

(2) Stenographic transcript of testimony taken before Trial Examiner Royster on October 8, 1953, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Royster's Intermediate Report issued on November 20, 1953 (annexed to item 5 hereof); order transferring case to the National Labor Relations Board dated November 20, 1953, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondents' Exceptions and Objections to Intermediate Report received by the Board on December 11, 1953.

(5) Copy of Decision and Order issued by the National Labor Relations Board on April 22, 1954,

with copy of Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 1st day of September, 1954.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-834

In the Matter of PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, doing business as SCHERRER AND DAVISSON LOGGING COMPANY and INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 23-93.

TRANSCRIPT OF PROCEEDINGS

Council Chambers, City Hall, Everett, Washington, Thursday, October 8, 1953.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Wallace Royster: Trial Examiner.

Appearances: Howard A. McIntyre, 407 U. S. Court House, Seattle, Washington, appearing on behalf of the General Counsel. Vern Castle, Box 218, Sultan, Washington, appearing on behalf of International Woodworkers of America, C.I.O. R. W. Maxwell, 4454 Stuart Building, Seattle, Washington, appearing on behalf of the Respondent. [1*]

Proceedings

Trial Examiner Royster: This is a formal hearing before the National Labor Relations Board in the matter of Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, doing business as Scherrer and Davisson Logging Company, on a charge filed by the International Woodworkers of America, Local 23-93.

My name is Wallace Royster. I am the trial examiner designated to hear the evidence, to make finding of fact and recommendations to the Board in respect to the issues raised by the pleadings and the evidence. Will counsel please state their appearances for the record.

Mr. McIntyre: For the General Counsel, Howard A. McIntyre, 407 U. S. Court House, Seattle, Washington.

Trial Examiner Royster: For the Union?

Mr. McIntyre: For the Union, Mr. Vern Castle, Box 218, Sultan, Washington.

Mr. Maxwell: For the employer, Patterson, Max-

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

well & Jones, by R. W. Maxwell and R. M. Oswald, 4454 Stuart Building, Seattle, Washington. [3]
* * * * *

Mr. Maxwell: At this time, counsel for the Board called my attention that they had not received an answer. I do not find it in my file. I definitely recall dictating an answer. We requested an extension of time with which to file. I therefore would like to state that, or ask leave to file the written answer as soon as the hearing is over, and at this time state that our answer will be as follows: Admitting paragraph 1, admitting paragraph 2, except that Scherrer and Davisson do not sell to stock timber. They are contract loggers for Stock Paper Company. Their cut last year was approximately seven and a half to eight million feet of logs. Their cut so far this year, approximately three and a half million feet; all of which are Stock Paper Company logs, and all of which were converted into products which move in interstate commerce. We will admit paragraph 3. We will admit paragraph 4. [4]
* * * * *

ALEX MANKER COOK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Would you state your full name for the record please?

A. Alex Manker Cook.

Q. Mr. Cook, what is your address?

(Testimony of Alex Manker Cook.)

A. Star Route, Granite Falls.

Q. Where are you presently employed?

A. At the present time I am working for myself.

Q. What is your normal occupation?

A. My normal operation is power saw operator.

Q. Is that the line of business that you are in at the present time, working the power saw?

A. Yes.

Q. How long have you operated a power saw?

A. Well, right around about eight years.

Q. Have you made a living at operating the power saw for eight years? A. Yes, sir.

Q. Where was the greatest part of this employment? [9]

A. Well, the biggest part was with R. W. Logging Company, Granite Falls, and the Wilmack Logging Company of Granite Falls.

Q. At those places of employ you operated a power saw? A. Yes, sir.

Q. Mr. Cook, did you ever operate a power saw for Scherrer and Davisson Logging Company?

A. No, sir, I never did.

Q. Did you ever attempt to make any application for employment at Scherrer and Davisson Logging Company?

Mr. Maxwell: I object to the form of question calling for a conclusion.

Q. (By Mr. McIntyre): Did you ever seek employment from the company? A. Yes, sir.

Mr. McIntyre: In the questioning of this witness

(Testimony of Alex Manker Cook.)

I would like to just refer to the company as "the company", and it will be the only company so stated.

Mr. Maxwell: Understood.

Trial Examiner Royster: All right.

Q. (By Mr. McIntyre): When did you first attempt to get employment from the company? [10] * * * * *

A. The first time I applied was in March, along towards the first of March, somewhere around in there.

Q. (By Mr. McIntyre): What year?

A. 1953.

Q. Nineteen fifty what? A. 1953.

Q. 1953? A. Yes.

Q. With whom did you speak for the company?

A. At the time I talked to the bull bucker of the cutting crew, Mr. Red Davisson.

Q. Where was it that you spoke to Mr. Davisson?

A. At that time it was in his house, down to his house. * * * * * [11]

Mr. McIntyre: Before going on with the examination I would like to know if counsel will stipulate a William Davisson is part owner of the Scherrer Logging Company.

Mr. Maxwell: He is one of the partners.

Mr. McIntyre: Can we also stipulate that William Davisson is also known as Red Davisson?

(Testimony of Alex Manker Cook.)

Mr. Maxwell: Yes.

Q. (By Mr. McIntyre): You say you went to Mr. Davisson's house? A. Yes, sir. [12]

Q. At that time did you have any conversation with him?

A. Yes, we talked a little bit just visiting and I asked him for the job.

Q. What job did you ask him for?

A. I asked him for a power saw job.

Q. Where were you staying at the time?

A. I was sitting down at the table.

Q. Did you have any further conversation with Mr. Davisson?

A. We didn't talk very long because they were going somewhere. They were going to a pot-luck supper. And then when he left he followed me out to the car and I told him if he needed a man to let me know and he said he would.

Q. At that time you had made application for a power saw operator?

A. Yes, sir, that is the first time I saw him.

Q. Did he tell you why he was unable to hire you immediately?

A. Not at that time he didn't.

Q. Were you ever contacted by Mr. Davisson after that to be employed? A. No, sir.

Q. Did you ever contact Mr. Davisson after that time? A. Well, I did once after that.

Q. When was the next time you contacted him relative to employment?

(Testimony of Alex Manker Cook.)

A. It was right around the last of April or the first of May [13] somewhere around in there.

Q. Around the last of April or the first of May?

A. Yes, sir.

Q. Where did you contact him?

A. It was at his house.

Q. At his house?

A. It was outside, but it was at his house.

Q. What time of day was that?

A. The best I remember it was around 4:30.

Q. Was there anyone else present?

A. Yes, sir. Mr. Delbert Rawlins.

Q. Where was it outside the house?

A. It was in Mr. Rawlins' car that I talked to him.

Q. Was Mr. Rawlins talking to Mr. Davisson when you arrived at the house? A. Yes.

Q. Were they sitting in Rawlins' car?

A. Yes, they were sitting in the front seat of the car.

Q. Where was Mr. Rawlins sitting?

A. He was on the driver's side.

Q. And Mr. Davisson was sitting on the other side of the front seat? A. Yes, sir.

Q. Did you get in the car?

A. Yes, I got in the back seat. [14]

Q. At that time did you have any conversation with Mr. Davisson?

A. Well, he and Delbert were talking, and when they got through I asked him if he was going to have a job for me, and he started making excuses

(Testimony of Alex Manker Cook.)

that the rigging was still on and he didn't have any need, he said the snow was pretty deep yet up on the hill, and I asked him at that time if it wasn't because of the trouble at the Wilmac, if they didn't have something to do with it. He said, "That is the whole damn thing." That is the words he said.

Q. What is Wilmac? Is that another company?

A. That is the company I worked for the year before. I worked for them three years.

Q. You had worked for them three years?

A. Yes, sir.

Q. In what capacity had you worked for them?

A. Power saw operator.

Q. At the time of this meeting I believe you said it was late in April or early in May of 1953. Relative to that period of time when was the last time you had worked for Wilmac?

A. November I believe was the last.

Q. Of 1952? A. Yes, sir.

Q. During the time that you worked for Wilmac did you have any—were you a member of any Union? [15]

A. Yes, sir, I was a member of the I. W. A.

Q. Did you have any position with the I. W. A.?

A. Well, at that time I was vice president at Granite Falls District and I was also shop steward on the job, and I was on the safety committee there.

Q. Where is the Wilmac operation?

A. Their address is Granite Falls.

Q. How far from Scherrer and Davisson Logging Company?

(Testimony of Alex Manker Cook.)

Mr. Maxwell: Just a moment. Do you mean how far from the Scherrer and Davisson offices or their logging?

Q. (By Mr. McIntyre): How far from the Scherrer and Davisson operation?

A. I believe at the present time Scherrer and Davisson is in Sultan, Washington, Wilmac in Granite Falls area. Their address is Granite Falls.

Q. Does Wilmac have any office in Granite Falls?

A. They have an office, it is a little ways out of Granite Falls. Just a little bit east of Granite Falls on the mountain loop highway.

Q. About how far?

A. I would say about two or three miles out of town, east of town.

Q. Does Scherrer and Davisson have any office that you know of in Granite Falls?

A. I am not sure, but I believe they have an office in [16] Davisson's home at Granite Falls. I am not sure of that, though.

Q. During the time that you were working at Wilmac, did you, I believe you said you were shop steward.

A. Yes, sir, I was shop steward there.

* * * * *

Q. (By Mr. McIntyre): Was there any strike at that time, during the time you worked at Wilmac?

A. Yes, sir, in 1952, I believe in the Spring we had a strike. And then we went back to work, and

(Testimony of Alex Manker Cook.)

the same Fall we went on strike again for another ten weeks.

Q. How long were you out?

A. I think we were out ten or eleven weeks the last time.

Q. That was in the Fall of 1952?

A. Yes, sir.

Q. At that time were you shop steward?

A. Yes, I was. * * * * * [17]

Q. Has Mr. Davisson ever contacted you for employment? A. No, sir, he hasn't.

Q. To give you employment? A. No, sir.

Q. Have you ever been asked to go to work for Scherrer and Davisson by any of the company's officials? A. No, sir, I haven't.

Q. How far do you live from Mr. Davisson?

A. I would say a mile and a half maybe. [18]

* * * * *

Cross Examination

Q. (By Mr. Maxwell): Did the local Union have a working agreement with Scherrer and Davisson? A. Not in '52 I don't believe.

Q. Do you know?

A. Well, I am pretty positive they didn't have the contract.

Q. Do you have the records of the Union available? A. I guess we can get it.

Q. Did they have a working agreement in '53?

A. Yes, sir, I think they have.

Q. Your testimony is definitely that they had no working agreement in 1952 with the local Union?

(Testimony of Alex Manker Cook.)

A. I think they were working sub-contractors in 1952, the way I got it.

Q. Your testimony is that they did not have a working agreement with the local Union in 1952?

A. I would say that, yes.

Q. Were they under any working agreement?

A. Yes, sir, they were working under the Soundview Pulp Company.

Q. Do you know the terms and provisions, generally, of that agreement?

A. No, sir, I am not too familiar with it, in their case.

Q. Is it what they call the standard form of agreement? [22]

A. Well, I wouldn't know.

Q. Are you a member of the shop committee?

A. Yes. At the Wilmac I am.

Q. Wilmac has a working agreement, don't they?

A. Yes, sir.

Q. It was a standard agreement?

A. Yes, sir.

Q. As a matter of fact, the Union has a standard agreement with all of the operators in the area, do they not?

A. Not all of them I don't think.

Q. They had one with Scherrer and Davisson, didn't they? A. Not in 1952.

Q. Scherrer and Davisson was working under the Soundview agreement?

A. Sub-contract.

Q. When a crew is laid off in the Fall because

(Testimony of Alex Manker Cook.)

of weather, what is the provision of the agreement with reference to calling them back?

A. As a general rule we always hope that they would go by the seniority.

Mr. Maxwell: I move that that be stricken. It is not what they hope, it's what the provisions are.

The Witness: That is what the contract calls for.

Mr. Maxwell: That is what the contract calls for.

Trial Examiner Royster: Does that satisfy you?

Mr. Maxwell: That is all right.

Q. (By Mr. Maxwell): When you first contacted Mr. Davisson they weren't operating, were they?

A. I wouldn't say for sure if they had started at that present time.

Q. Didn't he tell you that they weren't operating?

A. It seemed like they said that they had to put the rigging on first.

Q. You mean that they were going to put the rigging crew to work first?

A. That is right. The older men.

Q. Didn't he tell you that they had men who had been in their employ when they closed down for the winter of '52 that they were calling back?

A. Yes, and he said he didn't know how many were coming back, but he was pretty sure that he didn't have enough, that he would need some men.

Q. Did he tell you that they were moving their logging shoe to over near Sultan?

A. No, sir. I was over there then.

(Testimony of Alex Manker Cook.)

Q. Didn't he refer to the fact that the new shoe would be approximately 52 miles from Granite Falls? A. No, sir.

Q. Didn't he tell you that if he were to hire any new men he was going to hire them in the Sultan area because they wouldn't [24] have the problem of transportation?

A. He did say something about they wouldn't have a Crummie running from Granite Falls this year.

Q. He did refer to the fact that it was going to be a 52 mile trip over there, did he not?

A. I don't think he said about how far it was, because he knows that I know how far it is, because I worked over there before.

Q. It is around 52 miles?

A. I wouldn't say for sure.

Q. How far is it?

A. I would say that it is close to that, but I couldn't say exactly because I never measured it.

Q. How close?

A. I would say that you are pretty close.

Q. You do admit that if he needed any men he was going to hire them at Sultan?

A. No, he didn't tell me that.

Q. Didn't he say to you that if he were going to hire any men that he was going to hire them from the Sultan area because he didn't want the transportation problem?

A. No, sir, he never told me that.

Q. He didn't tell you that?

(Testimony of Alex Manker Cook.)

A. No, sir. He did tell me he wasn't going to run a Crummie.

Q. He did tell you that he was not going to run a Crummie? [25]

A. Yes. And I told him I could drive to Sultan.

Q. I wish you would fix the date on which you called on Mr. Davisson with reference to this employment.

A. You mean the second time I talked to him?

Q. How many times did you talk to him?

A. I talked to him twice.

Q. The second one is the next time.

A. I would say it's along about the last of April or the first of May, right in there. The last day of April or the first day of May. One of the two.

Q. Isn't it a fact that it was on the fifth day of May that you refer to?

A. No, I don't think it was.

Q. Do you know one of the Union members had died of cancer up there about that time and was buried about that time?

A. Yes, I knew him.

Q. What was his name?

A. Jim Burnathy.

Q. Wasn't it the day of his funeral?

A. Well, I wouldn't know for sure.

Q. As a matter of fact, you and Mr. Rawlins were in separate cars, weren't you?

A. Yes, sir.

Q. And Mr. Rawlins was driving ahead of you?

A. That is right. [26]

(Testimony of Alex Manker Cook.)

Q. Where had you been that day?

A. We had been to Lake Rossinger.

Q. What did you go to Lake Rossinger for?

A. We were going down there to see a guy about a donkey.

Q. As a matter of fact, that is the day the donkey was delivered? A. No, sir.

Q. What did you want a donkey for?

* * * * *

A. Well, I didn't have a job at the time, and we went down there to get the donkey, and I had a little bit of timber around my place and we decided to take that out while we weren't doing anything.

Q. (By Mr. Maxwell): Did you buy the donkey?

A. Yes, sir.

Q. You and Mr. Rawlins?

A. Mr. Delbert Rawlins.

Q. Mr. Rawlins was stopped at Mr. Davisson's house when you pulled up in your car?

A. Yes, sir.

Q. Where was Mr. Rawlins' car?

A. It was in Mr. Davisson's driveway. [27]

Q. Where did you park?

A. I parked on the road.

Q. Isn't it a fact that you never did get out of your car?

A. Yes I got out of the car.

Q. You did get out of your car?

A. Yes, sir.

Q. You did talk to Mr. Davisson?

A. I got out of the car and went down to Mr.

(Testimony of Alex Manker Cook.)

Rawlins' car, and then Red hollered at me and said come on and get on in. So I got in the back seat.

Q. What were they talking about when you got there?

A. I don't know for sure. I think it was more or less about a job.

Q. Just a minute, what did they say when you got in?

A. Well, I was outside the car and I didn't hear what the conversation was. When I got in the car he asked me how I was doing or something like that, and then I asked him, Red, if he would have the job for me then. And that was about all that was said.

Q. Weren't they talking about the donkey?

A. They might have said a little something about the donkey.

Q. Weren't they also talking about the fact that you and Mr. Rawlins were going to go into pulp wood logging? A. No, I don't think so.

Q. You were, weren't you? [28]

A. They might have been talking about it before I got into the car. But I don't know.

Q. As a matter of fact, you and Mr. Rawlins had been making plans to go into Gyppo logging for yourselves of pulp wood, isn't that a fact?

A. No, we hadn't.

Q. You hadn't? A. No, sir.

Q. Didn't you make application to the State of Washington for a permit to cut? A. Yes.

Q. When did you make that application?

(Testimony of Alex Manker Cook.)

A. Well, I made that about along in February, I believe.

Q. What was the area that you were asking permission to cut the timber from?

A. It was on the southwest quarter of the northwest quarter of Section 8. Township 30.

Q. Were you granted a permit to cut?

A. Yes, sir, I was.

Q. And you say you made that application when?

A. I believe, I'm not sure of the dates, but I think it was in February sometime.

Q. Isn't it a fact that that application was made in April?

A. Well, I wouldn't swear to that because I don't know just when I did make it. But I know I made it. [29]

Q. The northwest quarter of the southwest quarter of Section 8, Township 30 north, Range 8 east?

A. Yes, sir.

Q. That application was made by you on the 28th day of April, isn't that a fact?

A. I wouldn't say for sure because I don't remember the dates very well.

Mr. Maxwell: The State did not furnish these in duplicate and we did not have the extra forms prepared. And I will ask leave to prepare a duplicate. I will ask the reporter to mark this for identification.

Trial Examiner Royster: That will be Respondent's 1.

(Testimony of Alex Manker Cook.)

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Maxwell): Handing you what has been marked for identification as Respondent's Exhibit No. 1, I will ask you to identify this form.

A. That is my own private application.

Mr. Maxwell: I move the answer be stricken.

Trial Examiner Royster: Let it go out. Just address yourself to the question, Mr. Cook. Can you identify the form?

A. I am sure that I filled a form out pertaining to this description, but I wouldn't swear to this form here. It may not be the one, I don't know.

Q. (By Mr. Maxwell): This is a copy. "I hereby certify that [30] the attached is a true and correct copy of the application for timber cutting permit in the files of the State Division of Forestry." Signed L. T. Webster, Supervisor, Division of Forestry.

A. I turned my copy in to the ranger station and he filled it out and sent it in for me.

Q. Referring to the date on this, the 28th day of April, does that refresh your recollection as to the date that it was made out?

A. I went up in February to see what I had to do to cut the timber, see?

Q. Yes.

A. I think I did let it go. It probably was in April.

(Testimony of Alex Manker Cook.)

Mr. Maxwell: I will ask leave to offer this. We offer the exhibit.

Mr. McIntyre: May I ask a question?

Trial Examiner Royster: Yes.

Mr. McIntyre: If the date on that document states that it is April 28, 1953, are you satisfied that that is the day that you filed?

The Witness: Well, it possibly is, yes.

Mr. McIntyre: I will stipulate that that is the day that he filed the application.

Mr. Maxwell: We will offer it anyhow.

Trial Examiner Royster: Without any objections, Respondent's Exhibit 1 is received. [31]

(The document heretofore marked Respondent's Exhibit No. 1 for identification was received in evidence.)

Trial Examiner Royster: In view of the stipulation in respect to that exhibit I will waive the requirement of filing the duplicate.

Mr. Maxwell: Thank you. We have to get duplicates from Olympia.

Q. (By Mr. Maxwell): As a matter of fact, you were issued a permit on that application card.

A. Yes, sir, on that little bit of ground there.

Q. Yes. At the time before you made application, you had inquired about a donkey, hadn't you?

A. We bought this little donkey.

Q. You bought that little donkey after you made application?

A. We had the donkey up there along about May the 9th or something like that.

(Testimony of Alex Manker Cook.)

A. As a matter of fact you had it on May 5th, didn't you?

A. I am not sure of the dates, but it was somewhere in there.

Q. You had been down to see the donkey before you purchased it? A. Yes.

Q. This donkey was advertised for sale, was it?

A. I don't think it was, no.

Q. As a matter of fact you had seen it because you had passed the place where the donkey was located? [32]

A. I go over to my mother-in-law's, and that is the road, and I had seen it there before.

Q. As a matter of fact, before you bought the donkey you and Mr. Rawlins went down there and ran the donkey for a day?

A. I think that you are mistaken there. We ran it for about five days.

Q. About five days before you bought it?

A. Four or five days, yes.

Q. You were satisfied with it and you bought it?

A. Yes, sir.

Q. That was delivered on the 5th day of May, wasn't it?

A. I wouldn't swear to the day, but it is close.

Q. It was the day that you bought the donkey that you and Mr. Rawlins stopped and talked to Mr. Davisson?

A. No, I wouldn't say that it was the day that we bought it. It was the day that it was delivered. No, it wasn't the day it was delivered, no.

(Testimony of Alex Manker Cook.)

Q. As a matter of fact, hadn't you and Mr. Rawlins made plans to go into the Gyppo Logging yourselves?

A. Well, I hadn't made any plans to. I couldn't get a job and I had to do something.

Q. You were making plans to go into the Gyppo Logging?

A. I figured on taking the timber off of my own place.

Q. At the time that you stopped, you and Mr. Rawlins had decided to purchase this donkey and to go into business, isn't [33] that correct?

A. No, not necessarily. We decided to take the timber out there that I had bought.

Q. As a matter of fact, you had been in business for yourself and Mr. Rawlins, hadn't you?

A. For this summer, yes. We have been working for ourselves.

Q. Have you registered with the State Tax Commission? A. No, sir, I have not.

Q. What are the duties of a shop steward?

A. He carries out the wishes of the crew.

Q. What sort of dispute does he handle?

A. Well, if there is somebody that wants to pay their dues, he takes their dues. And if there is somebody that gets canned unjustly and he figures he is, he comes to the shop steward and tells him. Anything like that.

Q. He handles grievances is all, isn't it?

A. Yes, that is right.

(Testimony of Alex Manker Cook.)

Q. You referred to a strike in the Spring of 1952? A. Yes.

Q. As a matter of fact, that was area-wide throughout northern Washington, was it not?

A. Yes, sir.

Q. All of the Unions were out, all of the I. W. A. Unions?

A. Yes. Oregon and California and Washington.

Q. That pertained principally to health and welfare program [34] and paid holidays?

A. Yes, sir.

Q. At the same time your local Union had opened and asked for Union shop agreement, isn't that correct?

A. Yes, sir. We had that in our negotiations.

Q. That strike was settled, paid holidays granted and the health and welfare program and employer paid and managed was granted, isn't that right?

A. Yes, sir.

Q. And the negotiations closed, isn't that correct? A. Yes. All but local points.

Q. And the second strike that you refer to was the strike over the Union shop, was it not?

A. Well, there was vacation pay involved there, too. And Union shop.

Q. Union shop primarily?

A. And vacations. They were brought in issue.

Q. There were other companies on strike in the area at—— A. (Interrupting) No, sir.

Q. Was W. R. W. out? A. Yes.

Q. Wilmac was out?

(Testimony of Alex Manker Cook.)

A. Yes, those two.

Q. That strike lasted about ten weeks, didn't it?

A. Yes, sir, or eleven. [35]

Q. It was settled but no Union shop granted, isn't that correct?

A. We got a Union maintenance.

Q. But not a Union shop?

A. No, sir, we didn't.

Q. During this time, you had any dealings at all with Mr. Davisson? A. No, sir.

Mr. Maxwell: That is all.

Redirect Examination

Q. (By Mr. McIntyre): Did you ever have any conversation with Mr. Davisson where you told him that you no longer desired to be employed because you were going into employment yourself?

A. No, sir. [36]

* * * * *

Q. If you were offered employment by the Scherrer and Davisson Logging Company right now would you take the employment?

Mr. Maxwell: I will object to that as immaterial as to what he would do. It is a self-serving declaration calling for a conclusion.

Trial Examiner Royster: I will overrule the objection. You may answer.

A. Yes, sir, I will take the job.

Mr. McIntyre: No further questions.

(Testimony of Alex Manker Cook.)

Recross Examination

Q. (By Mr. Maxwell): You were granted a permit to cut [37] pursuant to the application that you made?

A. Yes, I was granted a permit to cut that little bit of timber that I had, yes.

Q. That is all?

A. That is all I have. We have a permit on the timber that we have now. That we are taking out now, but it is not in that bunch. It is some relog.

Q. As a matter of fact, you have made application on three or four other locations to log, haven't you?

A. No, sir. The lady made this. She had this timber that had been logged once and we went up and we cleaned it up. And she has an application with our name on it.

Q. You were to be the operator?

A. For us to take it off, yes.

Q. Yes. And then you also made arrangements to log some Forest Service land, didn't you? You did log on Forest Service land?

A. We logged for a little bit for a kid, Mr. Keller, that was on the Forest Service.

Q. You purchased this monkey and paid cash for it, did you not? A. Yes, sir.

Further Redirect Examination

* * * * * [38]

Trial Examiner Royster: When the strike ended

(Testimony of Alex Manker Cook.)

at Wilmac in the Fall of 1952, did you then go back to your job there?

The Witness: I went back to work there for 18 days and then we were all laid off on account of snow.

Mr. Maxwell: As a matter of fact, you still hold seniority rights at Wilmac.

Mr. McIntyre: Objection.

Trial Examiner Royster: I will overrule the objection. You may answer.

The Witness: As far as I know. I have never been called back to work.

Mr. Maxwell: But you are subject to call under the Union agreement?

The Witness: I guess I would be if any number come up for employment, if they wanted to put me on.

Mr. Maxwell: All right.

Mr. McIntyre: That is all.

Trial Examiner Royster: You may be excused.

(Witness excused.)

Trial Examiner Royster: The record should show that the donkey referred to is a gasoline rig used to bring the logs in.

DELBERT RAY RAWLINS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [39]

Direct Examination

Q. (By Mr. McIntyre): Mr. Rawlins, what is your full name?

A. Delbert Ray Rawlins.

Q. Where do you live, Mr. Rawlins.

A. Star Route, Granite Falls.

Q. What is your occupation?

A. I am a logger.

Q. How long have you been in the logging business? A. About ten years.

Q. At the present time are you in business with Mr. Cook? A. Yes, sir.

Q. Did you ever work for Scherrer Davisson Logging Company? A. Yes, sir.

Q. When did you first go to work for them?

A. In 1950.

Q. In what capacity were you working?

A. Power saw operator.

Q. How long did you work for them?

A. The rest of that season, I started in July. I worked the rest of that season and then '51.

Q. And in '51, was that the last time that you worked for them?

A. No, sir, I worked four days in 1953.

Q. Four days in 1953?

A. Or 1952, excuse me.

Q. Do you recall the month of those four days?

(Testimony of Delbert Ray Rawlins.)

A. I think it was the fore part of September.

Q. Of 1952? A. Yes, sir.

Q. After that time did you make any attempt to get employment from the company?

A. Yes, sir.

Q. With whom did you try to get that employment? A. Mr. Davisson.

Q. Is that Red Davisson? A. Yes, sir.

* * * * * [41]

Q. (By Mr. McIntyre): When was it that you first made an attempt to get employment after September '52?

A. I think possibly the second week in March.

Q. At that time were you employed?

A. No.

Q. You talked to Mr. Davisson about employment? A. Yes.

Q. Did he tell you about why he wasn't employing you?

A. They weren't working at the time I asked him first.

Q. That was in March? A. Yes.

Q. You had that conversation—did you have some conversation with him? A. Yes.

Q. What was that conversation?

A. I asked him if he could give me a job this year. And he said, I don't see why not.

Q. Was anything else said?

A. Yes. He told me that he would have to put the rigging crew falling and booking for awhile until he got some timber down to haul, and when

(Testimony of Delbert Ray Rawlins.)

they started the rigging that they would need some more men.

Q. Did Mr. Davisson contact you for employment? A. Yes, he did. [42]

Q. When did he contact you?

A. I am not sure of the exact date, but I think it would have been about the second or third of April.

Q. Where did he contact you?

A. At my place.

Q. At your home? A. Yes, sir.

Q. What time of day was it, do you recall?

A. It was in the evening.

Q. Did you have some conversation with him on that date? A. Yes, sir.

Q. What was that conversation?

A. He told me that he couldn't hire me.

Q. He told you that he could not hire you?

A. Yes.

Q. Did he tell you why he couldn't hire you?

A. It was because of the Union activity, because of that strike.

Q. Is that what he told you?

A. He said that——

Mr. Maxwell: (Interrupting): I am going to move to strike all of this on the ground that it does not pertain to the charge involving Mr. Cook. And is irrelevant to the issue here involved, and outside of the complaint and the charge made.

Trial Examiner Royster: I will deny the motion to strike. [43] I would like to have the witness,

(Testimony of Delbert Ray Rawlins.)

though, just tell what was said on this occasion without anything further.

Q. (By Mr. McIntyre): On that particular occasion you said that you had some conversation with Mr. Davisson. Would you please repeat as well as you remember what that conversation was?

A. It is rather dry. There was quite a bit of it. He had been talking to his partners, principally Oscar Scherrer, and I think Mr. Mackie, and they were the ones that insisted that I not be hired.

Q. Is that what he told you?

A. That is the way I understood it. That he, personally, wanted me.

Q. He said that he, personally, wanted you?

A. Yes, he wanted me.

Q. Was there anything else said that you recall?

A. Yes, he said that it looked to him that they were trying to starve me and Mr. Cook out.

Q. You referred, I believe, in that conversation to a Mr. Mackie. Who is Mr. Mackie?

A. He runs the Wilmac Logging Company. Or is one of the owners of it.

Q. Did you have any other conversation with him at that time?

A. I think that he told me that he would go back and talk to the other members of the partnership and see if he couldn't get [44] them to let him hire me.

Q. Was there anything else said that you recall?

A. He told me that he thought that it would

(Testimony of Delbert Ray Rawlins.)

probably be all right if I could get free from the W. R. W.

Q. If you could what?

A. If I could get free from the W. R. W. Logging Company. I worked for them last year.

Q. The W. R. W. is the logging company?

A. W. R. W. * * * * *

Q. After that date did you have any other conversation relative to employment with Mr. Davisson? A. Yes.

Q. When was the next time?

A. I have gotten my dates all mixed up. I think it was—it was only a few days later. I think it was the first part of April.

Q. Where was that conversation?

A. That was at Mr. Davisson's home.

Q. Was there anyone else present?

A. Yes, sir.

Q. Who was present? A. Mr. Cook.

Q. Was Mr. Cook present for all of the conversation? [45] A. No, he wasn't.

Q. Did you arrive at Mr. Davisson's home before Mr. Cook? A. Yes, sir.

Q. As soon as you arrived did you have some conversation with Mr. Davisson?

A. Yes, sir.

Q. Where did that conversation take place?

A. In my car.

Q. In your car. Were you driving?

A. I was parked in his driveway.

Q. Parked in Mr. Davisson's driveway?

(Testimony of Delbert Ray Rawlins.)

A. Yes.

Q. Did he get in your car?

A. Yes, he did.

Q. Did Mr. Cook join you later? A. Yes.

Q. Did you have any conversation?

A. Yes.

Q. What was that conversation?

A. I asked him if he had seen Oscar, if I could go to work. And he told me that Oscar said it was all right, that I could come to work.

Q. Was that Oscar Scherrer, his partner?

A. That is right.

Q. Was anything else said? [46]

A. I think that was about all until Mr. Cook arrived. It was only a short time.

Q. Was Mr. Cook following right behind you in his car?

A. Just a short distance behind.

Q. Mr. Cook arrived? A. Yes.

Q. Did he get in the car?

A. Yes, he did.

Q. Where did he sit?

A. In the back seat.

Q. Did you hear any conversation between Mr. Davisson and Mr. Cook? A. Yes, sir.

Q. What was the conversation?

A. Mr. Cook asked him if he would have a job for him, this year.

Q. What did Mr. Davisson say?

A. He said he didn't know. He said that they still had the rigging crew falling and bucking and

(Testimony of Delbert Ray Rawlins.)

he didn't know how many men were coming back, so he wasn't sure. And Mr. Cook said, I think, that it looks to me that Mackie has got something to do with it, and as near as I remember the words, Mr. Davisson said, "I know damn well he has."

* * * * * [47]

Q. Any time during that conversation did you advise Mr. Davisson that you had purchased a donkey?

A. We might have mentioned that we were looking at one. I think we did possibly.

Q. Did you tell him the reason for it?

A. We were figuring taking out some timber.

Q. Did you tell Mr. Davisson the reason?

A. I think so.

Q. Did you go to work for Scherrer and Davisson at that time? A. No.

Q. Did you tell them why. A. Yes.

Q. When did you tell them that you would not go to work for them?

A. It was a few days later.

Q. Who did you tell? A. Mr. Davisson.

Q. What did you tell him?

A. I told him that I wouldn't be able to work for him until such time as Mr. Cook got a job because I couldn't leave him alone.

Mr. McIntyre: No further questions.

Cross-Examination

Q. (By Mr. Maxwell): Did you know Mr. Bernathy? The man who died? [48] A. Yes.

(Testimony of Delbert Ray Rawlins.)

Q. What date was it that you and Mr. Cook stopped to see Mr. Davisson?

A. I don't remember the exact date.

Q. Was it in May?

A. I think it was the very last part of April.

Q. You and Mr. Cook had been down looking at this donkey, hadn't you?

A. Yes, we had.

Q. You had decided to purchase it on that date?

A. Yes.

Q. That is the date the donkey was delivered, is it not? A. No.

Q. You purchased the donkey from a Mr. Huswick? A. Yes, sir.

Q. And he delivered it to you, didn't he?

A. Yes, he did.

Q. And you had been down that day to look this donkey over and you purchased it, and on the way back you happened to see Mr. Davisson working on the Crummie truck, isn't that correct?

A. That is right.

Q. When you saw him you pulled into his driveway and stopped? A. Yes.

Q. You told him that you regretted not being able to go to Mr. Bernathy's funeral, but you couldn't because you had been down [49] there to buy this donkey.

A. I don't remember telling him that.

Q. You didn't go to that funeral, did you?

A. No.

(Testimony of Delbert Ray Rawlins.)

Q. The reason that you didn't go is because you had been looking at the donkey?

A. I don't even remember the day the funeral was.

Q. To refresh your recollection, it was the fifth day of May.

A. No. My check stub that I wrote the check out to pay for the donkey the day he delivered it was marked May 5, and this was before that.

Q. Mr. Bernathy was a good Union man, wasn't he? A. I think he was.

Q. He had been quite an active member of the Union for a long time?

A. Since I knew him he hadn't been too active.

Q. Did you work at Wilmac? A. No.

Q. Did you work at W. R. W?

A. W. R. W.

Q. Were you there late in '52 when they had the strike over the Union shop?

A. Yes, sir.

Q. You are a neighbor of Mr. Davisson, aren't you? A. Yes, sir. [50]

Q. And you had been a neighbor for a long time? A. Yes, sir.

Q. How far apart do you live?

A. About a mile.

Q. You live between Mr. Davisson and Mr. Cook, is that right? A. Yes, sir.

Q. During the time that this Union shop strike was on, you asked Mr. Davisson for a job, didn't you?

(Testimony of Delbert Ray Rawlins.)

A. Yes, sir. Very shortly after the strike went on I asked him if I could work up there.

Q. And you did get the job?

A. Yes. He called me up a few days later and asked me if I could come to work.

Q. And you were on strike at the time?

A. Yes, sir.

Q. And you had been taking part in the strike?

A. I was on the committee.

Q. You were on the Union committee?

A. That is correct.

Q. And you also had been doing some picketing? A. Yes, sir.

Q. Despite this Mr. Davisson hired you?

A. Yes, sir.

Q. How long have you known Mr. Davisson?

A. I don't know. About seven years I imagine.

Q. Mr. Davisson was a member of the I.W.A. before he started in business for himself, wasn't he? A. I don't know.

Q. Do you know if Mr. Scherrer was?

A. I don't know that either.

Q. Do you know whether all of the partners were? A. I couldn't tell you.

Q. You say that Mr. Davisson did offer to hire you? A. Yes, he did.

Q. That was in April of 1953?

A. Yes, it was the last, I believe the last day of April or right in there. At that time I refused the job I told him why. That I couldn't leave Alex alone——

(Testimony of Delbert Ray Rawlins.)

Mr. Maxwell: Just a moment. I asked for an answer to be answered yes or no. And I asked for a simple answer.

Trial Examiner Royster: You may answer that question or not, and then go on to explain your answer in effect.

The Witness: Would you please restate the question.

Mr. Maxwell: Would you please read it to him?

(Question read.)

A. Yes.

Q. (By Mr. Maxwell): You refused the job?

A. Yes.

Q. At that time he didn't state to you whether he would or wouldn't hire Cook, isn't that correct?

A. I don't think he stated that to me. I don't recall.

Q. You don't recall whether he said he would or would not hire Cook?

A. It seems to me, but I am not sure, I had better not answer that.

Q. As a matter of fact, at that time all of his old men hadn't been called back to work, isn't that correct?

A. I don't just get the meaning of your question. Up until the time that he offered me a job do you mean?

Q. When did he offer you this job again?

A. It would have been the last days of April or the first days of May.

Q. At that time he was still calling back to work

(Testimony of Delbert Ray Rawlins.)

individuals who worked for them in the Fall when they shut down because of weather?

A. I think they must have all been on the payroll at that time. Because I had no seniority and he would naturally have called them before he offered me a job.

Q. On the occasion when you stopped and drove in the driveway and talked to Mr. Davisson, Mr. Cook was following you in his car?

A. That is right.

Q. How long had you been there before Mr. Cook arrived?

A. I don't think it could have been over five minutes.

Q. You got out of your car and walked over to where Mr. [53] Davisson was working on the Crummie, didn't you?

A. I never got out of my car at all.

Q. As a matter of fact, at that time you did discuss this gas donkey that you and Mr. Cook were purchasing?

A. We may have talked about it.

Q. You told Mr. Davisson that you and Mr. Cook were going into logging?

A. I don't remember the exact conversation, but I think we talked about the donkey.

Q. At that time you and Mr. Cook had decided to go into logging, hadn't you?

A. We had decided to take out some timber until such time we could get a job and then we figured

(Testimony of Vernon B. Castle.)

Q. Does that pertain to the—does that also apply to negotiations of contracts? [57]

A. Yes.

Q. Do you participate in negotiating contract for your Local? A. Yes.

Q. Have you on occasion participated in the negotiations for contract with Scherrer Davisson Logging Company in your Union? A. Yes.

Q. Has your local Union ever been a party to any labor agreement with the Scherrer Davisson Logging Company? A. Yes.

Q. At the present time is it under contract with the company?

A. Yes. I might add there for the record, that while we haven't got the signed stipulations renewing this year's contract, we still have been operating under last year's contract.

Q. What was the first contract between your Union and the company since you have held the office that you now hold?

A. I believe it was in November 1952.

Q. In November 1952 you entered into your first contract with the company? A. Yes.

Q. Do you know Mr. William Davisson?

A. Yes.

Q. Do you know Mr. Alex Cook?

A. Yes.

Q. As business representative for your Union have you ever been contacted by any companies for the purpose of having your [58] Union furnish men for work? * * * * *

(Testimony of Vernon B. Castle.)

A. I am frequently contacted by various employers seeking men to place on positions.

Q. (By Mr. McIntyre): Have you ever had any conversation with Mr. Davisson relative to the employment of men? A. Yes.

Q. Did you ever have any conversation with Mr. Davisson relative to the employment of power saw men? A. Yes.

Q. Did you have any conversation with Mr. Davisson in 1953 relative to the employment of power saw men? A. Yes.

Q. Do you know what month that was?

A. I believe it was in the month of May.

Q. In the month of May of 1953?

A. I think it was either in the month of May or the very early part of June.

Q. Where did that conversation take place?

A. Granite Falls.

Q. Approximately what time of day was that?

A. Oh, approximately 5:30 in the afternoon.

Q. Placing it closer, you are the same Vern Castle that filed the charge in this proceeding?

A. Yes.

Q. Did the conversation with Mr. Davisson take place before the filing of the charge?

A. Yes.

Q. Did it take place before you had knowledge that a charge was to be filed? A. Yes.

Q. And the conversation took place in Granite Falls? A. Yes.

Q. Where in Granite Falls?

(Testimony of Vernon B. Castle.)

A. Corner Tavern.

Q. Did you meet Mr. Davisson in there?

A. Well, not by prearrangement, but I did meet him in there.

Q. Was he there before you got there?

A. I don't recall.

Q. But you did have conversation in there with him? A. Yes.

Q. Would you repeat what that conversation was.

A. He asked me if there were any power saw men available. He said that he needed one or two power saw men. I am not sure the number that he needed, but he was looking for some power saw men. [60]

Q. What did you tell him?

A. I told him there should be some around the other valley, meaning around the Sultan Valley. But I didn't know just offhand right at that time who there would be. * * * * *

Q. After that occasion did you have any other conversation with Mr. Davisson relative to the hiring of any power saw men? A. Yes.

* * * * * [61]

Q. (By Mr. McIntyre): When did you have the next conversation?

A. On, I would say around the tenth of June.

Q. Where did that conversation take place?

A. At Sultan.

Q. Sultan, Washington? A. Yes.

Q. Approximately what time of day was that?

(Testimony of Vernon B. Castle.)

A. About 4:30 or quarter till five in the afternoon.

Q. Just where in Sultan did it take place?

A. At Second and Main.

Q. Second and Main. Did you just meet him on the corner there?

A. It is the corner where the crew buses come into and stop at, and if there is any rearrangement of the crew to ride on to Granite Falls that is where it is done. And I believe they also have the power saws work on at the shop on that corner. I am not sure about that, but I think they do. It is their regular stopping place when they go to work in the morning and when they come back in at night.

Q. Just what was that conversation?

A. That when I asked him how come he didn't hire Alex Cook. What was the matter that he didn't hire Alex Cook. And informed him that if they didn't hire him that we would file unfair labor practice charges against the company.

Q. What did he say then?

A. Well, he didn't say very much. He said that Alex Cook was [62] a good man, he would like to have him. But then he made some statement to the effect that there wasn't room for him on the Crummie. He didn't want to hire any more from Granite Falls because there wasn't any more room on the Crummie, that is the crew truck.

Q. Did he say that that was the only reason, there wasn't any room on the Crummie?

(Testimony of Vernon B. Castle.)

A. He didn't say that there wasn't reason. He said that he was a good man and that he would like to have him. * * * * * [63]

Q. Do you know where Mr. Alex Cook lives?

A. Yes.

Q. About how far from the company's operations does he live?

A. Oh, I would say approximately 50 miles where you have to drive with a car.

Q. About fifty miles?

A. Approximately that.

Q. Do you know other—do you know any other employees that were employed by Scherrer Davisson in May of 1953 who drive 50 miles from the operation? A. Yes.

Q. Are you able to recall them by name?

A. Well, there was a Tom Stalnaker.

* * * * * [64]

Q. (By Mr. McIntyre): Do you know Frank Brush? A. Yes.

Q. Was he employed by the company in May of 1953? A. Yes.

Q. Do you know where he lives?

A. Granite Falls.

Q. Do you know Ralph——

Trial Examiner Royster: (Interrupting): What do you mean by the term "employed by the company"?

The Witness: New hire.

Trial Examiner Royster: What do you mean by

(Testimony of Vernon B. Castle.)

your question. We have gotten what the witness means by his answer.

Q. (By Mr. McIntyre): Was he working for the company?

A. Yes, he was working for the company during the month of May.

Q. Where did he work?

A. He was working out at their logging operation out of Sultan. * * * * *

Q. (By Mr. McIntyre): Do you know Ralph Dexter? [65] A. Yes.

Q. Was he employed by the company in May of 1953? A. Yes.

Q. Was he working on their logging operation at that time? A. Yes.

Q. Where does he live?

A. I believe he did live at Granite Falls, I am not sure. He might have lived in Everett I am not sure about that.

Q. Do you know Mr. Delwin Russel?

A. Yes.

Q. Do you know where he lives? A. Yes.

Q. Where does he live?

A. About two miles from Granite Falls.

Q. Was he employed by the company in May of 1953?

A. I believe it was May that he went to work for them. * * * * *

Q. (By Mr. McIntyre): Do you know Mr. Leonard Treen? A. Yes.

Q. Do you know where he lives? [66]

(Testimony of Vernon B. Castle.)

A. I don't know exactly where he lives. But he lives out towards Arlington between Granite Falls and Arlington, out in that area.

Q. About how far would that be from the company's operation?

A. Well, I suppose it would be 50 miles or more.

Q. Did he work at the company's operation in May of 1953?

A. I believe that is when he went to work too, yes. * * * * * [67]

Cross-Examination

Q. (By Mr. Maxwell): Mr. Dexter worked—was an old employee and worked for them before, isn't that true?

A. I think he had worked for them before, but he had been gone for quite some time and was rehired.

Q. He had worked for the company prior to that time? A. Yes.

Q. Isn't that true of Mr. Brush?

A. Not that I know of.

Q. Do you know that Mr. Brush was not employed by them before?

A. I would say no, that he had never been employed by them before in the last five years.

Q. What about Mr. Anderson?

A. And I don't think he had, either.

Q. What about Mr. Russel?

A. I am not sure about Mr. Russel. But I do

(Testimony of Vernon B. Castle.)

know that Mr. Russel the previous year was working at another operation.

Q. Mr. Treen worked there a short time, isn't that correct? A. Yes.

Q. As a matter of fact, Anderson and Treen worked there only [68] a short time, both of them?

A. It wasn't too long a time.

Q. What was Mr. Brush's job?

A. I don't know.

Q. Rigging, wasn't it?

A. I don't know for sure.

Q. It wasn't cutter?

A. I don't know. I think he was working on the rigging, but I really don't know.

Mr. Maxwell: I believe that is all.

Redirect Examination

Q. (By Mr. McIntyre): Does your contract provide for a seniority clause? A. Yes.

Q. The one with the Scherrer Davisson company? A. Yes.

Q. Did the one that was negotiated in November 1952 provide for a seniority clause?

A. Yes.

Q. Did that seniority clause make any allowances for old employees of the company?

A. Yes.

Q. Employees who had not been employed at the company at the time the contract was executed?

A. No, it wouldn't provide for any seniority for anybody that [69] hadn't been an employee yet.

(Testimony of Vernon B. Castle.)

Q. Let me ask you this: Did you hear the testimony of Mr. Rawlins? A. Yes.

Q. He testified that he was employed by the company in 1950. A. Yes.

Q. Would that seniority clause make any provisions for his seniority? A. No.

Q. How far back would it go?

A. The reason it wouldn't apply to Mr. Rawlins was because he hadn't worked long enough to establish any seniority and then he went on another job. * * * * * [70]

FRED ALLEN ROBERTS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McIntyre): Mr. Roberts, would you state your full name for the record, please.

A. Fred Allen Roberts.

Q. Mr. Roberts, where do you live?

A. Startup, Washington.

Q. Mr. Roberts, did you ever work for Scherrer Davisson Logging Company? A. Yes, I did.

Q. What year did you work there?

A. 1953.

Q. When did you first go to work?

A. About June 1.

Q. What job were you working?

A. I was chaser on the cold deck.

(Testimony of Fred Allen Roberts.)

Q. Who hired you? A. Red Davisson.

Q. Is he one of the partners, did you understand? A. Yes, he is.

Q. Did you also know Oscar Scherrer?

A. Yes, I do.

Q. Is he also one of the partners?

A. Yes.

Q. Did you know Alex Cook?

A. Yes, I do.

Q. Did you ever have any conversation after having been employed by Scherrer Davisson with Mr. Oscar Scherrer relative to Mr. Cook's Union activity? A. Yes, I did.

Q. Can you recall about when that was?

A. It was around a week after I was hired.

Q. Where did that conversation take place?

A. It took place beside the donkey one afternoon while we were eating lunch.

Q. Was Mr. Scherrer eating lunch with you?

A. Yes, he was.

Q. You had some conversation with him?

A. Yes, I did.

Q. Would you repeat what that conversation was?

A. He said he wouldn't hire Alex Cook because he was too active in the Union and he was afraid if he hired Alex Cook that Alex would cause his men to go out on strike. And he heard [72] around the country that Alex Cook was the cause of all the strikes and that it had happened before.

Q. Did he say anything else in that conversa-

(Testimony of Fred Allen Roberts.)

tion relative to the Union activity of Alex Cook?

A. No, that was all.

Q. Did he ever have any other conversation with you relative to Alex Cook's Union activities?

A. Yes, we did. Once on the cold deck, but it was the same thing. He said the same things as he did before. He was talking about the same things.

Q. When was that?

A. About another week.

Q. About another week after the first conversation? A. Yes.

Q. About what time of the day, do you recall?

A. It was in the afternoon. He was helping me chase on the cold deck.

Q. Would you repeat again what that conversation was at the cold deck?

A. He said then again that he wouldn't hire Alex Cook because he was too active in the Union.

Q. Did you ever have any conversation with Mr. Davisson, either before or after you were employed by the company, relative to Alex Cook's Union activity?

A. Yes, I did. Once before and before Red hired me. I was [73] there one evening and he said that he would like to hire Alex Cook but he couldn't because his partners wouldn't let him.

Q. Where did that conversation take place?

A. That was at Red Davisson's house.

Q. About how long before you were employed?

A. That was about a week.

Q. Where are you employed now?

(Testimony of Fred Allen Roberts.)

A. Great Northern Railroad.

Q. How long did you continue in the employ of Scherrer Davisson?

A. About a month and a half.

Mr. McIntyre: No further questions.

Cross-Examination

Q. (By Mr. Maxwell): When did this first conversation take place, what date?

A. I don't know the exact date, about a week after I was hired.

Q. When were you hired? A. June 1.

Q. You were on the rigging?

A. Yes, sir.

Q. How old are you? A. Eighteen.

Q. How old were you then?

A. I was eighteen then. [74]

Q. Did you have a permit?

Mr. McIntyre: Objection.

Trial Examiner Royster: Sustained.

Q. (By Mr. Maxwell): Is it your testimony that Mr. Scherrer just voluntarily brought this subject up and made that statement?

A. Yes, he did.

Q. Just out of the clear sky?

A. Yes.

Q. And it is your testimony also that on the second occasion he just voluntarily brought it up and said that to you? A. Yes, he did.

Q. As a matter of fact, you are a brother-in-law of Mr. Cook? A. Yes, sir.

(Testimony of Fred Allen Roberts.)

Q. Mr. Cook has talked to you several times since? A. Yes, sir, once or twice.

Q. And he suggested these matters, did he not?

A. No, sir.

Q. When was the last time that he talked to you before testifying here?

A. He never talked to me before testifying here.

Q. How did the Board get your name?

Mr. McIntyre: Objection.

Trial Examiner Royster: I will overrule the objection. You may answer. If you know. [75]

A. They got it I guess through the Union hall or through the Government man who came up to talk to me.

Q. (By Mr. Maxwell): Were you a member of the Union? A. No, sir. Not at the time.

Q. Not at the time. How long did you work there? A. About a month and a half.

Q. You are not a member of that Union now?

A. Yes, sir.

Q. Do you continue to pay dues to them?

A. No, sir.

Q. Did you take a withdrawal?

A. No, sir.

Q. When was the last time you paid your dues?

A. About two months ago.

Q. As a matter of fact, this was the first job you ever had in the woods? A. No, sir.

Q. When did you work in the woods before?

A. I worked for the Monroe Logging Company about a month before.

(Testimony of Fred Allen Roberts.)

Q. That was in 1953? A. Yes.

Q. 1953 was the first year you have worked in the woods? A. Yes.

Q. When did this conversation take place at Red Davisson's [76] house?

A. About a week before I was hired.

Q. How did the subject come up then?

A. We got talking about my brother-in-law and I asked him if he came down and asked for a job, and he said yes he did. He said he was going to hire him and would like to hire him but he couldn't because his partners wouldn't let him.

Q. What month was that?

A. That was about May. The last of May.

Q. The last of May 1953? A. Yes.

Q. Who was present at the home?

A. No one, just me and Mr. Davisson.

Q. Where did the conversation take place?

A. At his home on the back porch.

Mr. Maxwell: That is all.

Trial Examiner Royster: Was anyone present in a position to hear on either of these occasions when Mr. Scherrer made the remarks to you that you testified before?

The Witness: No, sir.

Trial Examiner Royster: Anything else?

Mr. McIntyre: No.

Mr. Maxwell: No.

Trial Examiner Royster: That is all, Mr. Roberts. You are excused. * * * * * [77]

FLOYD L. DORNING

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your full name, Mr. Dorning?

A. Floyd L. Dorning.

Q. Where are you employed?

A. Scherrer and Davisson Logging Company.

Q. How long have you been employed by the Scherrer and Davisson Logging Company?

A. About five years.

Q. Are you a member of the Union, the International Woodworkers of America, Local 23-93?

A. I am.

Q. How long have you been a member of that Union?

A. Oh, off and on I have been a member since about 1940.

Q. Do you serve on any committees in the Union? A. I do.

Q. What committee are you on? [82]

A. I am shop steward.

Q. Is that an office?

A. It is on a job office.

Q. Shop steward at what operation?

A. Scherrer and Davisson.

Q. How long have you been shop steward?

A. About three years.

Q. Are employees in Scherrer and Davisson all members of the Union?

(Testimony of Floyd L. Dorning.)

A. Well, I couldn't say for sure, but I think they are a hundred per cent.

Q. And that has generally been true, has it not, over the past few years?

A. For the most part, yes.

Q. In your position as shop steward and as an employee of Scherrer and Davisson, have you ever found a case where they discriminated against an individual because of Union activity?

Mr. McIntyre: Objection.

Trial Examiner Royster: I will sustain the objection.

Mr. Maxwell: Just a minute. I would like to be heard on that.

Trial Examiner Royster: Go ahead.

Mr. Maxwell: We are charged here of discrimination because of Union activities. And here is a men who has served in the Union as a shop steward. He has been shop steward for [83] three years in the employ of this company, and I think I can bring up and show that during this whole period of time there has not been one case of discrimination.

Trial Examiner Royster: That would have to be assumed under the evidence. Under the evidence there is nothing to show any unfair labor practice except whatever the evidence may show in respect to Cook.

Q. (By Mr. Maxwell): Was the claim of Mr. Cook ever taken up with you?

A. Only as hearsay.

(Testimony of Floyd L. Dorning.)

Q. It never came to you through Union channels? A. Not that I know of.

* * * * * [84]

(Witness excused.)

VICTOR B. HILL

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your name? A. Victor B. Hill.

Q. Where are you employed?

A. Scherrer and Davisson Logging Company.

Q. How long have you been employed there?

A. This is my second year.

Q. You were employed in what year?

A. '52.

Q. At the time you went to work for Scherrer and Davisson were you a member of the International Woodworkers of America Union?

A. No.

Q. Did you have any conversation with any members of the company partners regarding membership? A. Yes, I did. * * * * * [85]

WILLIAM ROBE DAVISSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: [86]

Direct Examination

Q. (By Mr. Maxwell): Will you state your name, please?

A. William Robe Davisson.

Q. You are one of the partners of Scherrer and Davisson? A. Yes.

Q. You are the individual who is sometimes referred to as Red Davisson? A. Yes, sir.

Q. How long have you been engaged in the business of logging for yourself, or as a partnership, member of a partnership?

A. I think it was 1949 that we formed the partnership. Maybe '47 or '48.

Q. Did you work in the logging industry before that? A. For a short time, yes.

Q. Were you a member of the International Woodworkers of America? A. Yes, sir.

Q. Are you a member of any other Union?

A. American Federation of Labor, Teamsters Union.

Q. Were you a truck driver? A. Yes.

Q. Mr. Davisson, the firm of Scherrer and Davisson, are you charged with the responsibility of hiring men?

A. I hire men, subject to the approval of the partners.

(Testimony of William Robe Davisson.)

Q. You hire men for any part of the operation?

A. Yes.

Q. When did your operation shut down for the winter of 1952? A. In '52?

Q. Yes.

A. I think it was the first day of December.

Q. At that time did you have a Union contract with Local 23-93? A. Yes.

Q. When did you resume your operations? In 1953. A. May I look?

Q. To refresh your recollection you may examine your records. A. April 22nd.

Q. April 22, 1953? A. Yes.

Q. Under your Union agreement were you required to call back employees who had worked for you at the time of the shut-down?

A. Yes, sir.

Q. Did you call employees back?

A. I called them all.

Q. When you started operation, what part of the logging operation did you first start to work?

A. The cutting crew.

Q. Whom did you use on the cutting crew when you started in April? I mean, were they cutters?

A. Some of them were. Most of them were rigging men. Our [88] old rigging men.

Q. Employees who had been with you before?

A. Yes.

Q. Referring to March of 1953, were you contacted by Mr. Cook? A. Yes.

Q. Where? A. At my home.

(Testimony of William Robe Davisson.)

Q. At what time of day was that?

A. I imagine it was around five o'clock, I don't know for sure.

Q. What was said at that time?

A. Mr. Cook asked me if I would need any men in our cutting crew next season. I told him I would need quite a few men, but we were going to hire all of the cutting crew and all of the rigging crew that we could in the Sultan area to get away from transportation, hauling them.

Q. At that time did you promise Mr. Cook a job? A. No, sir.

Q. Did Mr. Cook make any statement as he left the house?

A. When Mr. Cook left the house he said, if you want me let me know. And I said O.K., and he went out.

Q. Did you follow him out? A. No.

Q. When was the next time that you saw or talked to Mr. Cook? A. On the fifth of May.

Q. How do you fix the date.

A. Because of the funeral that I had been to of one of our employees.

Q. At approximately what time was that? What time of day?

A. It was late afternoon. I don't remember the time.

Q. Would you relate what happened then on the fifth of May in the late afternoon?

A. I was working on the crew truck along side of the road. Mr. Rawlins drove up, stopped, and

(Testimony of William Robe Davisson.)

asked me about the funeral. He said that he couldn't go because he and Mr. Cook had been over in the Lake Rossinger area to see about buying a donkey or moving it home, or something, and then we went on talking about things. I don't remember just what.

Q. Did you get into Mr. Rawlins' car?

A. No.

Q. Where did you stand?

A. Along side of the car talking to him.

Q. On which side of the car?

A. It would be on the right side.

Q. Opposite of the driver's side?

A. Yes.

Q. Did Mr. Cook show up at that time?

A. He drove up probably five minutes after Mr. Rawlins and I had been talking.

Q. Was Mr. Cook in another car? [90]

A. Yes.

Q. Was anyone with him in the other car?

A. No.

Q. Where did Mr. Cook stop?

A. He stopped on the highway alongside of my driveway.

Q. Did Mr. Cook get out of the car?

A. No.

Q. Did you talk to Mr. Cook at all?

A. No.

Q. Did Mr. Cook talk to you? A. No.

Q. At that time did he ask you anything about employment? A. No.

(Testimony of William Robe Davisson.)

Q. Except for the time in March have you ever been contacted by Mr. Cook? A. No.

Q. Has the Union ever taken up with you the matter of your failure to hire Mr. Cook?

A. Yes.

Q. When?

A. I don't know dates, but once in Granite Mr. Castle accused me of unfair labor practice because I didn't hire Mr. Cook.

Q. Referring to Mr. Castle's conversation, do you recall in Granite having a talk with him then?

A. I talked with him, but not—— [91]

Q. (Interrupting): Do you recall on that occasion you said, you asked Mr. Castle about power saw men?

A. I don't remember whether I asked him that particular time. I have asked him a couple of times.

Q. Do you recall him stating to you there were power saw men available in the Sultan valley?

A. Yes.

Q. Referring to the meeting in Sultan, did you see Mr. Castle in Sultan? A. Yes.

Q. Did he ask you then why you had not hired Mr. Cook?

A. No. He just told me that he was going to show Alex Cook how to file charges against my company.

Q. Did you state to him at that time that you didn't want to hire more men from Granite Falls?

A. Yes.

Q. Did you ever state to Mr. Cook that your

(Testimony of William Robe Davisson.)

refusal to hire him was because of any alleged Union activities on his part? A. No, sir.

Q. Did you ever make a statement to Mr. Cook that a Mr. Mackie was trying to starve him out of the country? A. No, sir.

Q. Did Mr. Cook ever make that statement to you? A. No.

Q. Under your working agreement is any dispute or grievance [92] to be taken up by the Union with the company? A. Yes.

Q. Did this Union, through its committee or officers, ever bring to your company under the grievance procedure of the contract, a complaint as to your refusal or failure to hire Mr. Cook?

A. No.

Q. In March did Mr. Rawlins contact you about a job? March of 1953.

A. I think it was in April of 1953.

Q. That was the first time? A. Yes.

Q. At that time did you promise him a job?

A. I told him if he would quit the W.R.W., whom he was working for at that time, that I would give him a job.

Q. When were you to give him this job?

A. When we put the cutting crew to work after the rigging crew was through.

Q. What was your reason for telling him to quit W.R.W.?

A. They are holding their seniority there. If I hired him and then W.R.W. went back to work he would quit me and go to work back there again.

(Testimony of William Robe Davisson.)

Q. What did Mr. Rawlins say with reference to this offer of yours?

A. He told me if that is all it took he would quit. [93]

Q. Did Mr. Rawlins contact you at any time thereafter regarding a job?

A. Not until I went after him.

Q. About when was that?

A. I think the 10th of May.

Q. The 10th of May? A. Yes.

Q. Will you relate what happened then?

A. I went to get him to come to work and Mr. Rawlins told me that he and Mr. Cook were working for themselves taking out pulp wood, and that until Mr. Cook found employment someplace he couldn't leave him.

Q. At that time was any statement made with reference to Mr. Cook's Union activities?

A. No.

Q. Did you at any time make any statement to Mr. Rawlins with reference to Mr. Cook's Union activities? A. No.

Q. Were you present in the room when Mr. Castle testified? A. Just now?

Q. Yes. A. Yes.

Q. Was Mr. Frank Brush hired by your company? A. Yes.

Q. What was his job? [94]

A. What they call whistle punk.

Q. Is that on the cutting or the rigging crew?

A. Rigging crew.

(Testimony of William Robe Davisson.)

Q. Had Mr. Brush worked for you before?

A. No, sir.

Q. Where did Mr. Brush live?

A. In Granite Falls.

Q. What was the reason for hiring Mr. Brush who lived near Granite Falls?

A. Rigging men are hard to get, at any time. You have got to take them when you can get them.

Q. How about the cutting crew?

A. You can get them anyplace.

Q. Did you hear the testimony of Mr. Castle regarding your employment of Mr. Dexter?

A. Yes.

Q. Will you state the facts with reference to Mr. Dexter?

A. Mr. Dexter was on leave from our company, Army. He was in the Army. He held his seniority through the time he was in the Army.

Q. What about Mr. Stalnaker?

A. He was a new employee.

Q. When was he hired, approximately?

A. I think it was the 8th of May that he went to work.

Q. Was he on the rigging crew or cutting crew?

A. Cutting crew.

Q. Was there any understanding with Mr. Stalnaker about his commuting to work? A. Yes.

Q. Where did he live?

A. He lived in the Granite vicinity someplace. I don't know just exactly where.

(Testimony of William Robe Davisson.)

Q. What was the understanding with reference to the transportation.

A. That he drove to Sultan and we would haul him from there.

Q. What about a Mr. Earl Anderson?

A. He lived somewhere in the Sultan area. He came to Sultan, too.

Q. What about Mr. Russel?

A. He drove to Sultan.

Q. What about Mr. Treen?

A. The same with him.

Mr. Maxwell: Your witness.

Cross-Examination

Q. Did you ever tell Mr. Cook that you would hire him if he would furnish his own transportation? A. No, sir.

Q. Did you ever offer employment to Mr. Rawlins? A. Yes.

Q. When did you offer it? [96]

A. I think it was sometime in April. I don't remember just exactly when.

Q. What employment did you offer him?

A. Power saw work. Cutting crew.

Q. He lives by you, Mr. Cook, doesn't he?

A. Yes.

Q. Was there any discussion made as to what the arrangements would be for transportation for Mr. Rawlins?

A. Mr. Rawlins worked for us before, and I told him, I told Mr. Cook, too, that those old cutters

(Testimony of William Robe Davisson.)

we would haul. New men would have to furnish their own transportation.

Q. Did you hire any new employees after May 6 of 1953 who lived in Granite Falls?

A. Did I what?

Q. Did you hire any new employees after May 6, 1953, who lived in Granite Falls?

A. Yes, some of those men who we just spoke of, Granite Falls men. And new men.

Q. What about Mr. Wilder?

A. He had worked for us before.

Q. When did he work for you before?

A. May I question?

Q. Have you got your time book?

A. No, not that far back.

Q. I will withdraw the question. He worked for you in the [97] previous three years?

A. I think so, yes. I am not sure, I think so.

Q. Did he still have seniority?

A. I don't think so, no.

Q. Do you know Mr. Oscar Scherrer?

A. Yes.

Q. Do you know Mr. Mackie? A. Yes.

Q. Are they related? A. Yes.

Q. What is their relationship?

A. Mrs. Mackie is Mrs. Scherrer's mother.

Q. Mrs. Mackie is Mrs. Scherrer's mother?

A. Yes.

Q. Do the Mackies live over by the Scherrers, do you know?

(Testimony of William Robe Davisson.)

A. They live in Granite Falls, outside of Granite Falls.

Q. Who lives outside of Granite Falls?

A. Oscar Scherrer and Mrs. Scherrer.

Q. Where did the Mackies live?

A. In Granite Falls.

Q. How long had Mr. Dexter been out of the area when you hired him?

A. The time it took him to drive, you might say a leisure vacation, from New York to this coast.

Q. What did you consider leisure vacation? [98]

A. I don't know. He took his time coming from there. I don't know how long it was. I don't know when he was discharged.

Q. Wasn't it necessary for him to give you his discharge papers? A. No, it wasn't.

Q. Now, I believe when you were—during the early operation in March, you have a regular crew do you not, a rigging crew that is rather steadily employed? A. Yes.

Q. Do they do the cutting during the early part?

A. Not always. That depends on the timber that we have cut in the Fall, if any. This year we didn't have any.

Q. Didn't have any. Did they do the cutting?

A. They did part of it.

Q. Isn't it customary for the size of your operation to interchange employees to have them do something besides the strict classification job?

A. Yes.

(Testimony of William Robe Davisson.)

Q. So a cutter could do other jobs as well, and what are some of the other classifications?

A. Do you mean in rigging work?

Q. In regular logging operations.

A. Choker men, and loaders and riggers. Donkey puncher.

Q. When you need an employee, say as a cutter, do you look for an experienced logger or do you look strictly for a cutter? [99]

A. Nowadays we look for a cutter.

Q. You look for a cutter. If you can't find a cutter what do you do, do without?

A. I guess so.

Mr. McIntyre: No further questions.

Redirect Examination

Q. (By Mr. Maxwell): Was your failure to hire Mr. Cook because of any of his Union activities, present or past?

Mr. McIntyre: Objection.

Trial Examiner Royster: Overruled.

Q. (By Mr. Maxwell): Was your refusal to hire Mr. Cook because of his Union activities, present or past? A. No.

Recross Examinatiion

Q. (By Mr. McIntyre): What was your reason for refusing to hire Mr. Cook?

A. Relationship between the heads of two or three companies, logging companies, in Granite Falls.

(Testimony of William Robe Davisson.)

Mr. McIntyre: Would you read that asnwer back?

(Answer read.)

Q. (By Mr. McIntyre): Would you tell me what that relationship is?

A. I just explained to you. That Mrs. Oscar Scherrer is a daughter of Mrs. Mackie. Ray and Ross Willard, heads of W.R.W. Logging Company, are sons of Mrs. Mackie. [100]

Q. Did Mr. Mackie prevail upon Mr. Scherrer not to hire Mr. Cook?

A. No. We had more or less agreements—agreement over a period of time around Granite Falls between what was Soundview Paper then, that is Stockview paper now, W.R.W., Wilmac Logging Company and ourselves that we wouldn't steal each other's men.

Q. You knew Mr. Cook was out of work, didn't you?

A. Mr. Cook was, and still is, holding his seniority with Wilmac Logging Company.

Q. Why didn't you tell Mr. Cook that that was the reason why you didn't hire him?

A. I didn't tell him. I told Mr. Rawlins.

Q. You didn't ever tell Mr. Cook though, did you? A. No.

Q. And you know that that family relationship is a fact? A. Yes.

Q. You know of the interchange—and is that the same Mackie who is the owner of the Wilmac?

A. Wilmac Logging. * * * * * [101]

MARGUERITE MARIE DAVISSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Maxwell): Will you state your full name for the record?

A. Marguerite Marie Davisson.

Q. You are the wife of Mr. William Davisson?

A. Yes. * * * * * [108]

Q. Referring to the next meeting, and more particularly May 5, did Mr. Rawlins stop at your house on May 5?

A. He stopped out by the highway.

Q. Where were you?

A. I was in the front room.

Q. Did Mr. Red Davisson get in Mr. Rawlins' car? A. No.

Q. Did you see Mr. Cook arrive?

A. Yes.

Q. Approximately how long after Rawlins arrived did Mr. Cook arrive?

A. Oh, I would say it was about five minutes.

Q. Where did Mr. Cook stop his car?

A. He stopped his car on the highway.

Q. Did Mr. Cook get out of his car?

A. No. * * * * * [109]

[Endorsed]: No. 14,463. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, d/b/a Scherrer and Davisson Logging Company, Respondents. Transcript of Record. On Petition to Enforce an Order of the National Labor Relations Board.

Filed: September 3, 1954.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14463

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER, and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, Phillip Davisson, William Davisson, Oscar Scherrer, and Warner Scherrer, d/b/a Scherrer and Davisson Logging Company, in Granite Falls, Washington, their agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, d/b/a Scherrer and Dav-

isson Logging Company and International Woodworkers of America, Local 29-93, Case No. 19-CA-834."

In support of this petition the Board respectfully shows:

(1) Respondents constitute a partnership engaged in business in the State of Washington, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 22, 1954, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, their agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Repondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and

of the questions determined therein and make and entered upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board and requiring Respondents, their agents, successors, and assigns, to comply therewith.

Dated at Washington, D.C. this 29th day of July, 1954.

NATIONAL LABOR RELATIONS BOARD

/s/ By A. NORMAN SOMERS,
Assistant General Counsel.

[Endorsed]: Filed Aug. 2, 1954. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF ORDER OF NATIONAL LABOR RELATIONS BOARD

Come now the respondents above named, by and through their attorneys, Patterson, Maxwell & Jones, and for answer to the petition filed by the National Labor Relations Board seeking enforcement of an order issued by said Board, answer as follows:

I.

Respondents admit that they are a partnership engaged in business in the State of Washington

within the judicial circuit wherein the alleged unfair labor practice is charged to have occurred and that the Court has jurisdiction to hear the petition of the Board by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

II.

Respondents admit that on or about April 22, 1954, after hearing before the National Labor Relations Board in the above entitled matter, said Board duly stated its findings of fact and conclusions of law and issued an order directed to respondents, their agents, successors and assigns. That on or about the same date the Board's decision and order was served on respondents and respondents' counsel.

III.

Respondents admit that the Board's proceedings before the above entitled court is pursuant to Section 10 (e) of the National Labor Relations Act, as amended.

IV.

Respondents deny that the Board's order should be enforced for the following reasons:

(1) The findings of fact and conclusions of law are not supported by a preponderance of the evidence.

(2) The Trial Examiner and the Board failed to give consideration or any weight to undisputed facts and rested their findings upon fragments of testimony in the record, all of which was contrary to the weight of substantial evidence.

(3) Based its findings and conclusions that the failure of the company to hire Mr. Cook discouraged membership in the Union when there is no evidence to support said finding.

(4) Made a finding that the failure of the company to hire Mr. Cook did in fact interfere with, restrain and coerce members in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended, when as a matter of fact there is no evidence in the record to support such finding.

(5) By its order directed the Company to offer employment to Mr. Cook in the spring of 1954, with the rights that he would have had had he been hired in March, April or May of 1953, without regard to the contract or working agreement between the Company and the Union, which said order would compel the Company to violate the seniority provisions of said agreement and would prejudice the rights of other employees.

(6) Overruling objections timely made at the hearing by refusing to strike the testimony of Delbert Rawlins appearing on page 41 of the transcript at line 11 and extending through line 2 on page 45.

(7) Sustaining the Trial Examiner's ruling denying to respondent the right to go into and show the relationship which existed between the Union and the Company, all of which was relevant and material to the basic issues and was further evidence which should have been admitted to rebut the testi-

mony offered by the general counsel and permitted by the Trial Examiner to go into the record.

V.

Respondents herein object to the hearing of the Board's petition for enforcement upon the ground and for the reason that the Board entered an order requiring respondents to offer employment to Alex Cook and to reimburse Alex Cook for loss of earnings. That at the hearing on the unfair practice charge the Board offered and received no evidence as to loss of earnings and did not pass upon the issue. That it was shown by the record that from the time it was charged respondent denied employment to Alex Cook, Alex Cook was self-employed and engaged in business with himself and another as co-partners. That the record therefore presented the issue as to whether or not and to what extent the gross or net income of Alex Cook or the partnership of which he was a member should be taken into consideration in determining the amount, if any, of loss of earnings respondent should reimburse Mr. Cook. That the issue was squarely presented but not passed upon by the Board. That it involves a basic issue of law. That before an order of enforcement is sought the Board should be required and directed to determine the amount of back pay, if any. That unless this question is passed upon it will be necessary to again present the issue to the above entitled court for its determination. That the application of the Board is prematurely

made in that the Board has not yet passed upon all the issues presented by the case.

Wherefore, having answered the petition of the National Labor Relations Board, respondents pray this Honorable Court that it enter an order reversing and setting aside the order issued by the National Labor Relations Board herein and refusing to issue out of the above entitled court an order enforcing the whole or any part of the order issued by said Board. That before accepting and entertaining the petition of the National Labor Relations Board for an order of enforcement herein, the Court direct the Board to hold a hearing and determine the amount of loss of earnings which the Board contends respondents must pay to Alex Cook and specifically how Alex Cook's earnings should be computed in the light of the fact that during a substantial portion of the time Alex Cook is reputed to have suffered a loss he was engaged in business for himself or as a partner or joint adventurer with another or others.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY,

Respondents,

/s/ By R. W. MAXWELL
of Patterson, Maxwell & Jones,
Their Attorneys.

[Endorsed]: Filed Aug. 16, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED ON

In this proceeding, the petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly found that respondent Company violated Section 8 (a) (1) and 8 (a) (3) of the Act by discriminatorily denying employment to Alex Cook.

2. The Board's rulings and procedure were valid and proper.

Dated at Washington, D. C., this 1st day of September, 1954.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed Sept. 3, 1954. Paul P. O'Brien, Clerk.

No. 14463

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY,

Respondents.

Supplemental
Transcript of Record
(Pages 109 to 117)

On Petition to Enforce an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-24-54

No. 14463

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Witnesses, Respondent's:

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—direct 114
—cross 115

Davisson, Phillip

—direct 112

Davisson, William Robe

—direct 111

Huswick, Matt

—direct 116

Sherrer, Oscar

—direct 109
—cross 110

OSCAR SCHERRER

a witness called by and on behalf of the Respondent, being first [101] duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name, please?

A. Oscar T. Scherrer.

Q. Where do you reside?

A. Granite Falls, Washington.

Q. In Granite Falls?

A. No, three miles south of Granite Falls.

Q. Are you one of the members of the firm Scherrer and Davisson? A. Yes.

Q. Were you present when Mr. Roberts testified? A. Yes.

Q. Was Mr. Roberts employed as a whistle punk? A. No, as a chaser.

Q. Referring to the conversations that he referred to at lunch time, did you have any conversation or make any statements to Mr. Roberts regarding Alex Cook? A. No.

Q. Did you ever state to Mr. Roberts, did you ever engage in conversation to him about employing anyone? A. Not that I know of.

Q. On the second occasion, allegedly right after he had gone to work in the afternoon, did you ever state that you would not allow the company to hire Alex Cook? [102] A. I never did.

Q. Did you ever refer to any Union activities

(Testimony of Oscar Scherrer.)

of Alex Cook? A. Never have.

Q. How long have you been in the logging business?

A. Well, I have been an employer about five years, but I have worked in it about 25 years.

Q. Were you a member of the International Woodworkers of America Union? A. I was.

Q. Are you still a member?

A. No, I am not.

Q. You have a withdrawal card?

A. No, I haven't.

Q. When did your membership cease?

A. I think it was 1948.

Q. Is that the time you went into business for yourself? A. Yes.

Q. Have you ever refused employment to any individual because of Union activities?

A. No.

Q. Have any of your partners ever refused?

A. No.

Mr. Maxwell: Your witness.

Cross-Examination

By Mr. McIntyre:

Q. How long have you been in the logging [103] business in or around Sultan?

A. Oh, about four years.

Q. About four years, and it has been continuous in the past four years?

A. Well, in the logging season, yes.

(Testimony of Oscar Scherrer.)

Q. In that vicinity? A. Yes.

Mr. McIntyre: No further questions.

Trial Examiner Royster: That appears to be all, Mr. Scherrer.

(Witness excused.)

Mr. Maxwell: I would like to recall Mr. Davisson for just one question I think I overlooked.

WILLIAM ROBE DAVISSON

a witness called by and on behalf of the Respondent, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Maxwell:

Q. You are the Mr. Davisson who testified just a few moments ago? A. Yes.

Q. Mr. Davisson, did you ever talk with Mr. Roberts?

Mr. McIntyre: Objection. This is far beyond the scope of the direct and the redirect and re-redirect. Where do we stop on the examinations? [104]

Trial Examiner Royster: He said that it is something he overlooked. I am going to let him question the witness.

Mr. Maxwell: Roberts testified on this.

Q. (By Mr. Maxwell): Before Mr. Roberts was employed did you have a conversation with him at your home regarding Alex Cook?

Mr. McIntyre: Objection.

(Testimony of William Robe Davisson.)

Trial Examiner Royster: Overruled. You may answer.

A. No, not that I remember.

Q. (By Mr. Maxwell): Did you ever tell Mr. Roberts that you wanted to hire Mr. Cook but your partners wouldn't allow you?

Mr. McIntyre: Objection.

Trial Examiner Royster: Overruled.

A. No.

Mr. Maxwell: That is all.

Mr. McIntyre: No further questions.

Trial Examiner Royster: That is all.

(Witness excused.)

Mr. Maxwell: Mr. Davisson.

PHILLIP DAVISSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your full name, please?

A. Phillip Davisson.

Mr. McIntyre: Before we go into this, could I get a ruling [105] from the trial examiner as to whether or not he believes that the questions added to Mr. Davisson were beyond or were not beyond the scope of the direct examination.

Trial Examiner Royster: It was direct examina-

(Testimony of Phillip Davisson.)

tion. It was direct examination that had been overlooked when the witness was first called to the stand.

Q. (By Mr. Maxwell): Are you one of the partners of the firm of Scherrer and Davisson?

A. Yes.

Q. Prior to your becoming a partner of that firm what business or occupation were you engaged in?

A. Working in the woods.

Q. Were you a member of the International Woodworkers of America? A. I was.

Q. How long were you a member of the International Woodworkers of America?

A. I was a member of the local up here for three years and a half.

Q. Are you still a member? A. No, sir.

Q. Do you have a withdrawal card?

A. Yes, sir.

Q. During the time that you were a member of the Union did you ever serve on any committees? [106]

A. No, sir.

Q. Did you ever serve on any committees for the International Woodworkers of America other places? A. Yes, sir.

Q. Where? A. Local 29, Tacoma.

Q. What did you do for Local 29 in Tacoma?

A. I was presser.

Q. Were you on any committees?

A. Grievance committee in the mill.

Q. Did you ever talk with Mr. Alex Cook in this case? A. No, sir.

Q. Did Mr. Cook ever talk to you?

(Testimony of Phillip Davisson.)

A. No, sir.

Q. Did Mr. Castle ever talk to you about this case? A. No, sir.

Q. Did Mr. Rawlins ever talk to you about this case? A. No, sir.

Q. Did your company ever refuse to hire any individual, including Mr. Cook, because of alleged Union activities? A. No, sir.

Mr. Maxwell: Your witness.

Mr. McIntyre: No questions.

Trial Examiner Royster: That is all.

(Witness excused.) [107]

* * *

MARGUERITE MARIE DAVISSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

* * *

Q. Referring to March of 1953, on the occasion on which Mr. Cook has testified that he came to your home, do you recall that instance?

A. Yes, sir.

Q. Will you relate, were you present at all times?

A. Yes.

Q. Will you relate what was said at that time?

A. He came in and asked my husband if he would need cutters. He said yes he would, but he

(Testimony of Marguerite Marie Davisson.)

was going to try to hire all of his cutters in the Sultan area this year. Mr. Cook said he would move to Sultan. At that time I said we were thinking of moving to Sultan, too, but we hadn't been able to find anything over there that was suitable.

Q. Was Mr. Cook promised employment at that time? A. No, sir.

Q. What was said further with reference to employment? [108]

A. When he left he said, if you want me, call me.

Q. Anything further said? A. No.

* * *

Mr. Maxwell: Your witness.

Cross-Examination

By Mr. McIntyre:

Q. When Mr. Cook said "Call me if you need anybody," what did Mr. Davisson say?

A. He said, "O. K., Mr. Cook, if you need me, call me."

Q. What did Mr. Davisson say? [109]

A. He said, "O. K."

Mr. McIntyre: No further questions.

Trial Examiner Royster: That is all.

(Witness excused.)

MATT HUSWICK

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Will you state your name for the record?
A. Matt Huswick.
Q. Where do you reside, Mr. Huswick?
A. Route 4, Snohomish.
Q. Do you know a Mr. Rawlins and a Mr. Cook?
A. Yes.
Q. When did you first meet them?
A. Oh, it must be the last part of June.
Q. The last part of June? A. Yes.
Q. Of what year? A. '53.
Q. Were you the owner of a donkey?
A. Yes.
Q. Did you sell them the donkey?
A. Yes.
Q. When did you sell them the donkey? **[110]**
A. May 5th.
Q. May 5th? A. Yes.
Q. You must have met them before June, didn't you?

Trial Examiner Royster: I guess we will have to agree that that is so.

Q. (By Mr. Maxwell): Had they been over to your house before to see the donkey, this gas donkey? A. Yes.

Q. Had you advertised this donkey for sale?

(Testimony of Matt Huswick.)

A. No.

Q. How long before May 5th did they contact you or see you about the donkey?

A. About a week.

Q. Had they come over to run the donkey?

A. Yes, they had.

Q. How long did they do that?

A. They were there for about five or six days trying out the donkey, how she worked.

Q. And they were helping you at that time in that they were running the donkey? A. Yes.

Q. They appeared to be quite anxious to get the donkey? A. Yes.

Q. Did you deliver the donkey to them? [111]

A. Yes.

Q. On what day? A. May 5th.

Q. Where did you deliver it?

A. To Cook's.

Q. Mr. Cook's house near Granite Falls?

A. Yes. [112]

* * *

No. 14463

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER AND WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*),[1] for the enforcement of its order issued against respondents on April 22, 1954, following proceedings under Section 10 of the Act. The Board's decision and order (R. 7–27)[2] are reported at 108 NLRB

[1] The relevant provisions of the Act are printed in the Appendix, *infra*, pp. 18–20.

[2] Reference to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

No. 75. This Court has jurisdiction of the proceeding under Section 10 (e) of the Act, the unfair labor practice having occurred within this judicial circuit at Granite Falls, Washington.[3]

STATEMENT OF THE CASE

I.

The Board's finding of fact

Briefly, the Board found that the respondents violated Sections 8 (a) (3) and (1) of the Act by discriminatorily refusing to hire Alex Cook in the spring of 1953 because of his previous participation in several strikes that had occurred at neighboring lumber camps. The subsidiary facts as found by the Board,[4] and as shown by the evidence, may be summarized as follows:

Alex Cook, a member of the International Woodworkers of America, CIO, Local 23–93, had been employed for the past several years as an experienced power saw operator by the W. R. W. Logging Company, and more recently by the Wilmac Logging Company (R. 9–10; 32, 36). Both companies, as well as the respondents, are located in the Granite Falls,

[3] Respondents constitute a partnership which has its principal place of business in Granite Falls, Washington. As contract loggers for Scott Paper Company, respondent in 1952 cut over seven and a half million feet of timber belonging to Scott Paper Company, all of which was converted into products moving in interstate commerce. The value of respondents' services in 1952 to the Scott Paper Company approximated $105,000. No jurisdictional question is presented, since respondents conceded that their operations affect commerce within the meaning of the Act (R. 9; 4, 7).

[4] The Board adopted, with certain additions, the findings of fact made by the Trial Examiner, and adopted without modification his conclusions and recommendations (R. 22).

Washington, area. A Mr. Mackie, one of the owners of Wilmac, is related by marriage to Oscar Scherrer, one of the respondent partners, and to the two operators of the W. R. W. Logging Company (R. 10; 37, 57, 94, 97).

During Cook's employment in the 1952 season, two strikes for lawful economic objectives were called at both the Wilmac and W. R. W. operations. The first, a strike for paid holidays and a health and welfare program, was part of an areawide dispute covering the northwestern States, and the second arose over local issues (vacation pay and union security) and did not end until 18 days before the end of the 1952 logging season (R. 10; 37–38, 50–51, 52–53). Cook not only participated in both strikes, but at the time of their occurrence was vice president of the Union's Granite Falls district, and the Union shop steward at Wilmac (R. 10; 37). On a later occasion (see *infra,* p. 7), respondent Oscar Scherrer informed Cook's brother-in-law that "he heard around the country that Alex Cook was the cause of all the strikes" (R. 13; 77).

Near the opening of the 1953 lumbering season the following March, Cook visited the home of respondent William ("Red") Davisson to apply for a job as a power saw operator with respondents (R. 10; 33–34). Davisson, who lived only one and a half miles from Cook, was responsible for the respondent firm's hiring, subject to the approval of the other partners (R. 38, 85). He informed Cook that this year he would not have a "crummie"—a truck transporting the lumber crew—running between Granite Falls and

the Sultan area, 52 miles away, where respondents planned to conduct their 1953 logging operations. Cook thereupon offered to drive his own car to Sultan (R. 10–11; 41, 42). At the conclusion of the conversation, Cook requested Davisson to let him know if he needed a man, and Davisson answered "O. K." (R. 11, 34, 87).

Being without a job, and not having been recalled by the Wilmac Logging Company, where he held seniority, Cook decided to log some of his own timber until such time as he could get employment (R. 12; 43, 49). To that end he applied on April 28 for a cutting permit, and he also made arrangements, together with his friend Delbert Rawlins, for the purchase of a "donkey"—a gasoline rig used in lumbering operations (R. 12; 43, 44–46).

Delbert Rawlins, like Cook, was a power saw operator and a union member, and had been a striker in the spring and fall of 1952 (R. 11; 54, 63). He was also at that time a member of the union committee (R. 63). Like Cook, he asked Davisson for a job in March or April of 1953 (R. 11; 55). At that time Davisson told him that after the rigging crew had been working for a while "they would need some more men" (R. 55–56). Sometime later in April, however, Davisson indicated to Rawlins that although he personally wanted Rawlins, he could not hire him "because of the union activity, because of that strike" (R. 11; 56). Davisson adverted to his partners, principally Oscar Scherrer, as well as to Mackie, Scherrer's father-in-law and owner of Wilmac Logging Company, as "the ones that insisted that

[Rawlins] not be hired" (R. 57). He added that "it looked to him that they were trying to starve [Rawlins] and Mr. Cook out" (R. 11; 57). Nevertheless, Davisson offered to go back and talk to his partners to see if they would not approve Rawlins' hire (R. 11; 57); he also asked Rawlins to waive his seniority rights held with his former employer, W. R. W. Logging Company,[5] a request which Davisson admitted he at no time made of Cook, although Cook, like Rawlins, retained seniority with the firm that had last employed him (R. 11; 53, 57–58, 66, 97).

Early in May both Cook and Rawlins again visited Davisson and applied for employment (R. 12; 34–35, 59–60). Rawlins, who had arrived first and stopped his car in Davisson's driveway, inquired about his job application status and was informed by Davisson that Oscar Scherrer said he could come to work (R. 59). Rawlins and Davisson also discussed the purchase by Rawlins and Cook of the gasoline donkey (R. 60, 65). A few minutes later Cook drove up and joined the conversation.[6] When Cook again asked if Davisson

[5] Although Rawlins had worked for respondent Company in 1950, 1951, and for a few days in 1952, he in fact held no seniority or rehire rights with respondents, but only with W. R. W. Logging Company (R. 54–55, 76).

[6] The Board amplified the Trial Examiner's report, which was silent on the point, by adding that Mrs. Davisson testified "without direct contradiction" that Cook did not get in Rawlins' car on this occasion (R. 22–23). Actually both Cook and Rawlins testified that Cook left his own car to join Davisson and Rawlins in the latter's car (R. 35, 44, 59). The Board's inadvertent error in describing Mrs. Davisson's testimony on this point as uncontradicted is immaterial, since it adopted in full the Trial Examiner's credibility findings regarding the substance of the conversation that took place (R. 22).

had a job for him, Davisson, although he had just offered employment to Rawlins, at first replied that "the snow was pretty deep yet," that "the rigging was still on," and "he didn't know how many men were coming back, so he wasn't sure" (R. 35–36, 59–60). Cook thereupon asked Davisson point blank if "it wasn't because of the trouble at the Wilmac, if they didn't have something to do with it." Davisson answered, "that is the whole damn thing" (R. 12; 36, 60).

Unable to get employment, Cook began to log his own land with the assistance of Rawlins.[7] Rawlins in turn declined the employment proffered him by respondents, informing Davisson a few days after their talk that as long as Cook did not have a job, he could not leave him alone (R. 12; 60).

In early June, Davisson, who was still in need of power saw operators, asked the Union's secretary-treasurer and business agent, Vernon Castle, whether any men were available (R. 12–13; 70). Apparently unaware at that time of Cook's rejected application, Castle told Davisson there should be some around Sultan (R. 13; 70). Some days later, Castle asked Davisson why Cook had not been hired, pointing out to him that the Union was going to file charges against respondents if Cook were not hired (R. 71). Davisson replied that "Cook was a good man [and] he would like to have him," but that there was no room for him on the "crummie," and for that reason he did

[7] By the time of the hearing in October 1953, Cook and Rawlins had also done some logging at the request of private individuals on timber other than Cook's own (R. 52).

not wish to hire any more men from Granite Falls (R. 23; 71). As a matter of fact, since May 6, 1954, after Cook's employment application had been rejected a second time, respondents hired no less than five employees who lived in the Granite Falls area. One of these was an old employee, and one was possessed of hard-to-find skills; but the other three employees, Stalnaker, Russell, and Treen, appeared to be new hands, each of whom, as respondent Davisson admitted, arranged to do their own driving to Sultan, just as Cook had proposed to do (*supra,* p. 4) (R. 23; 72–75, 92–93).

Among new employees hired by Davisson in June was Fred Roberts, Cook's brother-in-law. Shortly before hiring Roberts, Davisson told him in the course of a conversation which touched on Cook's union activity that he would like to hire Cook, but "his partners wouldn't let him" (R. 13; 78). After Roberts started working, partner Oscar Scherrer told him on two occasions that "he wouldn't hire Alex Cook because he was too active in the union," in one case specifically stating that "he was afraid if he hired Alex Cook that Alex would cause his men to go out on strike," and that he had "heard around the country that Alex Cook was the cause of all the strikes" (R. 13; 77, 78).

At the hearing, the respondents denied the substance of most of the conversations attributed to them, denied that union activity had anything to do with their refusal to hire Alex Cook, and variously took the position that their failure to employ Cook was due to their reluctance to hire new employees living

at Granite Falls over 50 miles from their Sultan operations; to the fact that Cook was doing his own logging, and thereby had removed himself from the labor market; and lastly, to the fact that there existed an "agreement" or "relationship" among the interrelated owners of the several lumber companies in the area not to hire away each other's employees (R. 87, 92, 97). Respondents also resisted the charge of discrimination by showing that their operations were one hundred percent unionized, that they had a current contract with the Union, and that most of the partners were former union members.

II.

The Board's conclusions and order

On the foregoing facts the Board concluded that respondents refused to hire Cook because of his participation in strike activity, thereby discouraging membership in a labor organization in violation of Section 8 (a) (3) of the Act, and interfering with, restraining, and coercing Cook in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act (R. 17, 22). Accordingly, the Board ordered respondents to cease and desist from violating Sections 8 (a) (1) and (3) and to remedy the unfair labor practice by making an offer of employment to Cook and compensating him for his lost earnings (R. 24–25). Although the Board specifically found that Cook had not removed himself from the labor market by logging his own land, it left for later compliance proceedings all questions as to the actual amount of back pay due him (R. 16–17,

24–25). The order also provides for the posting of the usual notices (R. 25–27).

ARGUMENT

I.

Substantial evidence on the record as a whole supports the Board's finding that the respondents discriminatorily refused to hire Cook in violation of Sections 8 (a) (3) and (1) of the Act

Phelps Dodge Corp. v. *N. L. R. B.,* 313 U. S. 177, 183–187, establishes that it is an unfair labor practice for an employer to refuse employment because of an applicant's past union or strike activities. The sole substantive issue in this case, therefore, is whether substantial evidence supports the Board's finding that Cook's strike activities played a part in respondent's refusal to employ him.

We submit that the record summarized above, fully supports the critical finding. Thus, according to Rawlins' testimony, respondent William Davisson admitted that he was unable to hire Rawlins "because of the strike," and that it appeared to Davisson "that they were trying to starve [Rawlins] and Mr. Cook out." On a later occasion when Cook unsuccessfully reapplied for a job, Davisson admitted that the "trouble" at Wilmac was the "whole damn thing." And in three separate conversations with Fred Roberts, Cook's brother-in-law, either Davisson or respondent Oscar Scherrer attributed their refusal to hire Cook to his union activity, Scherrer explicitly expressing the fear that Cook would foment a strike

among the crew, and the belief that Cook was an instigator of other strikes that had occurred.

Respondents as witnesses in their own behalf denied the damaging statements attributed to them. But the sole issue raised by such denials is one of credibility which it is the function of the Trial Examiner to resolve. Once such a resolution has been made, the reversal of such findings is foreclosed by this Court's "oft-repeated rule that questions of credibility are for the Trial Examiner who has had the opportunity to observe the demeanor of the witnesses," *N. L. R. B.* v. *West Coast Casket Co.,* 205 F. 2d 902, 907 (C. A. 9); see also *N. L. R. B.* v. *Swinerton,* 202 F. 2d 511, 514 (C. A. 9), certiorari denied, 346 U. S. 814; *Motorola, Inc.* v. *N. L. R. B.,* 199 F. 2d 82, 84–85 (C. A. 9), certiorari denied, 344 U. S. 913; *N. L. R. B.* v. *State Center Warehouse,* 193 F. 2d 156, 157 (C. A. 9); *Boeing Airplane Co.* v. *N. L. R. B.,* No. 13802, C. A. 9, Sept. 23, 1954.

The Board's finding that the refusal to hire Cook was discriminatorily motivated, is "strengthened by the fact that the explanation . . . offered by the respondent fails to stand under scrutiny." *N. L. R. B.* v. *Dant,* 207 F. 2d 165, 167 (C. A. 9). For instance, respondents claimed that they failed to hire Cook because they desired to eliminate the transportation problem involved in shuttling men from Granite Falls to the Sultan area where their lumbering operations were then conducted. But this transportation problem was no obstacle to respondents' hiring no less than five men from the Granite Falls area *after* they had refused or failed to hire Cook, particularly since

Cook offered to furnish his own transportation. Again, respondents claimed that Cook was not in the labor market, since he had purchased a donkey to log his own timber. But Davisson did not hesitate to offer employment to Rawlins after the other partners had cleared him, even though Rawlins at the very time of the offer was known to have participated in the purchase of the machine. Finally, when asked point blank during the hearing why Cook had not been hired, Davisson referred to an "agreement" or a "family relationship" among the heads of the lumber companies in the area whereby men carried on the roster of one company would not be hired away by another. But this proved to be no obstacle to the employment of Rawlins, who, like Cook, was on lay-off status from his last employer, who held no seniority with respondents (R. 76), and who was specifically apprised by Davisson that he would have to notify his former employer that he was quitting. Davisson admitted that he at no time so informed Cook. Thus, although respondents have advanced three superficially plausible reasons for their failure to hire Cook, respondents' own admitted conduct shows that none of these three reasons prevented them from hiring employees to whom any or all such reasons were equally applicable. The fact that there might have been adequate nondiscriminatory reasons for not hiring Cook of course makes no difference if these were not the moving cause. Cf. *Wells, Inc.* v. *N. L. R. B.*, 162 F. 2d 457, 460 (C. A. 9); *N. L. R. B.* v. *Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 737 (C. A. 9), certiorari denied, 346 U. S. 937.

Lastly, respondents attempted to show that they could neither have discriminated against Cook, nor discouraged union membership by reason of such alleged discrimination, in view of the fact that all their employees were members of the Union; that one of the partners had encouraged a new employee to join the Union; that they had a contract with the Union; and that they themselves were past union members. As the court observed in *N. L. R. B.* v. *Nabors,* 196 F. 2d 272, 276 (C. A. 5), certiorari denied, 344 U. S. 865, "The fact that respondent retained some union members does not exculpate him from the charge of discrimination against those discharged (citing cases)." See also *N. L. R. B.* v. *Howell-Chevrolet Co.,* 204 F. 2d 79, 85 (C. A. 9), affirmed, 346 U. S. 482. Moreover, it is entirely possible not to be opposed to unions or to union members generally, and at the same time to discriminate against a particular union member who, as here, has singled himself out by his effective leadership within the Union, especially by what the respondents believed to be his responsibility for a prolonged strike at neighboring lumber camps with which they had close family connections. Clearly, the Act does not read so narrowly as to extend its protection only to inactive union members, but not to those who by their leadership make the Union an effective instrument of collective bargaining. Similarly, the absence of friction between respondents and rank-and-file union members does not preclude the Board's inference that discrimination against Cook tends to discourage less active members in assuming the initiative in exercising their rights

under the Act. The law is intended to protect effectual union membership as much as passive or ineffectual membership. Contrary to respondents' contentions, it is not necessary to show by specific evidence that the discriminatory failure to hire Cook discouraged membership in the Union, for the Board may draw such an inference from the very fact of the discrimination. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 48–52; see also *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 595–596 (C. A. 9).[8]

In short, the credited testimony supports the Board's finding that respondents' refusal to hire Cook was discriminatorily motivated, and the most that can be said of the various nondiscriminatory explanations put forward by respondents is that they permit of a contrary inference. In these circumstances "a court may [not] displace the Board's choice between two fairly conflicting views." *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488; *N. L. R. B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 907 (C. A. 9); *N. L. R. B.* v. *Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 737 (C. A. 9), certiorari denied, 346 U. S. 937.

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[8] The Board also found that the discriminatory refusal to hire Cook interfered with, restrained, and coerced Cook in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act. Under this theory, it need not be found that respondents' discrimination discouraged union membership. As the Board noted (R. 16), whether the discrimination violates Section 8 (a) (3) or 8 (a) (1), an offer of employment and compensation for lost earnings is the appropriate remedy. See *N. L. R. B.* v. *Buzza-Cardozo*, 205 F. 2d 889, 891 (C. A. 9), certiorari denied, 346 U. S. 923.

II.

The Board's procedure and order were valid and proper

Respondents, either before the Board or in their answer to the petition for enforcement, have raised several procedural contentions which require brief consideration.

1. Respondents objected to the failure of the Trial Examiner to strike the testimony of Delbert Rawlins, and in support of their objection claimed that Rawlin's testimony was incompetent, irrelevant, immaterial to any issue in the case, and prejudicial in character.

Rawlins was not named as a discriminatee in the charge or the complaint since he had rejected the respondents' offer of employment. He testified that respondent William Davisson told him respondents would not hire him (Rawlins) "because of the Union activity, because of that strike" and that Davisson added "it looked to him [Davisson] that they were trying to starve me [Rawlins] and Mr. Cook out" (R. 56, 57). This testimony is manifestly relevant to the question of respondents' motivation in denying employment to Cook.[9] Indeed, the statement attributed to Davisson is an admission, and is admissible as such. Moreover, even if the testimony related solely to Rawlins and not to Cook, it would be ad-

[9] In overruling respondents' first motion to strike Rawlins' testimony, the Trial Examiner stated at pp. 41–42 of the transcript, not reproduced in the printed record, that Rawlins' testimony would be admitted if it would "lead up to some conversations which will shed light on the issue of the refusal of employment to Alex Cook."

missible under the decisions epitomized in *N. L. R. B.* v. *National Seal Corp.,* 127 F. 2d 776, 778 (C. A. 2), that "when intent . . . is an issue it is always permissible . . . to show that the actor has been engaged in other similar transactions."[10]

2. Respondents objected to the exclusion of evidence in which they proposed to show that they at no time had discriminated against their employees because of union activity. In excluding testimony on this point, the Trial Examiner pointed out that there was no evidence showing any unfair labor practice except that relating to Cook, and that the absence of other unfair labor practices would have to be assumed (R. 83). Since the Trial Examiner assumed the existence of the very fact the respondents wished to prove by their excluded evidence, they were in no way prejudiced by the exclusion.

3. Respondents objected that the Board's order, requiring reinstatement of Alex Cook in a position he would have held had he been hired when first needed in 1953, violates the seniority provisions of their working agreement with the Union, and would prejudice the seniority rights of their employees. However,

---

[10] Respondents presumably rely on the so-called "rule of evidence" that actions of a person on a prior occasion cannot be used to show what happened on the occasion which gave rise to the legal controversy at issue. But this rule is inapplicable here, for the testimony of Rawlins illumines the *then current*, not merely the *future*, refusal to hire Cook. In any event, as Judge Goodrich stated for the Third Circuit, the so-called "rule" is "merely one of auxiliary policy to be called upon when the trial judge feels such evidence would unduly confuse the issue." *Moreau* v. *Pennsylvania R. Co.*, 166 F. 2d 543, 545, citing II Wigmore, Evidence, 3d Ed. 1940, Sec. 444.

since the employees whose seniority status might be affected would be given a status corresponding to that which they would have enjoyed absent respondents' illegal discrimination, they are not being deprived of their rightful seniority standing, but only of such advantages as may have accrued to them as a result of respondents' violation of the Act. As the Supreme Court has noted, the purpose of a Board order is the "restoration of the situation, as nearly as possible, to that which would have obtained but for the discrimination." *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194. To that end, the typical reinstatement order provides, as here, that employment must be offered to the discriminatee without prejudice to his seniority and other rights; and it is well settled that the Board is empowered to order the same remedial action where the discrimination has occurred in connection with the hire of new employees, as where it has occurred in connection with the discharge of old employees. *Id.* at pp. 187–189.

4. Respondents claim that the Board's petition for an enforcement decree is premature since no evidence was received relating to Cook's loss of earnings, and no determination made regarding the extent to which income from Cook's logging activity should be considered in the back pay calculations. Accordingly, respondents urge in their answer to the Board's petition that "before an order of enforcement is sought, the Board should be required and directed to determine the amount of back pay, if any" (R. 105). Since respondents made no timely objection before the Board regarding this purported defect or lack

of finality in the order recommended by the Trial Examiner they are precluded under Section 10 (e) of the Act from raising this contention for the first time before this Court. *Marshall Field & Co.* v. *N. L. R. B.,* 318 U. S. 253, 255; *N. L. R. B.* v. *Pinkerton Detective Agency,* 202 F. 2d 230, 233 (C. A. 9). At any rate, it is well settled that the appropriate procedure in this situation is for the Court to enter a decree enforcing the Board order although it fails to specify the amount of back pay due, leaving the calculation of such sum for later compliance proceedings. *N. L. R. B.* v. *Bird Machine Co.,* 174 F. 2d 404, 405–406 (C. A. 1); *Home Beneficial Life Insurance Co.* v. *N. L. R. B.,* 172 F. 2d 62, 63 (C. A. 4).

CONCLUSION

It is respectfully submitted that the Board's findings that respondents violated Sections 8 (a) (1) and (3) of the Act is supported by substantial evidence on the record considered as a whole, that its order is valid and proper in all respects, and that a decree should issue enforcing the order in full.

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November 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

* * * * *

Prevention of Unfair Labor Practices

Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person

from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . .

* * * * *

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of

the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1954

No. 14463

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, *Respondents.*

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF OF SCHERRER AND DAVISSON, Respondents

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BRIEF OF SCHERRER AND DAVISSON, Respondents

JURISDICTION

Respondents adopt petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

The respondents, Phillip Davisson, William Davisson, Oscar Scherrer and Warner Scherrer, co-partners d/b/a Scherrer and Davisson, are engaged in the business of logging. Their principal office is at Granite Falls, Washington. In 1953 the company's logging operations were being conducted in the vicinity of Sultan, Washington, a distance of over fifty miles from Granite Falls.

William Davisson, Oscar Scherrer and Phillip Davisson were formerly members of the I.W.A. affiliated with the C.I.O. prior to the formation of their

partnership in 1948 (R. 14 and 85). Respondents' employees have been represented by the I.W.A. and have been practically 100% unionized since the formation of the partnership (R. 82, 83).

Although respondents had entered into a working agreement with the I.W.A. local union 23-93 affiliated with the C.I.O. the failure or refusal of respondents to hire Mr. Cook was never taken up by the local union under grievance procedure provisions of the agreement (R. 66, 83, 84).

The working agreement between respondents and I.W.A. local union 23-93 contained a provision controlling the recall of employees after a layoff or shutdown (R. 86).

After ceasing operations late in 1952 because of weather conditions, the company resumed work on April 22, 1953, and pursuant to the terms of its union agreement called employees who had been in the employ of the company when it shut down in 1952 back to work (R. 86). Since there was no down timber at that time, the rigging crew was first employed to fall timber. This was the usual practice when operations were resumed. After sufficient timber was down the riggers were assigned to their regular work of yarding and loading and the cutting crew was then put to work (R. 95, 96).

In March, 1953, approximately two months before the Company commenced operations, Alex Cook, who lives near Granite Falls, called at the home of William Davisson, also near Granite Falls, and inquired as to whether or not the Company would be hiring any power

saw operators (R. 33). Mr. Davisson stated that he did not know how many of the Company's regular crew would report back for work when called, but assumed that they would need some men (R. 40, 41). He also told Cook that the Company was going to operate only one "crummy" (truck used for transportation of employees to and from work) to carry employees from Granite Falls to the logging area near Sultan (R. 41), and that they wanted to eliminate the transportation problem (R. 42, 87). Mr. Davisson further testified that he told Cook that the Company intended to hire only men living near Sultan or in the vicinity of the Company's operations (R. 87, 89). Although Mr. Cook denies this (R. 41), his denial is refuted by his later testimony that he (Cook) "could drive to Sultan" (R. 42). Both Mr. and Mrs. Davisson disagree with Mr. Cook's version of this offer (R. 87).

This evidence is further substantiated by Mr. Castle, Secretary-Treasurer and Business Agent of I.W.A., Local 23-93, who was contacted by Mr. W. Davisson in May regarding available power saw operators and advised Mr. Davisson that there were power saw operators available in the Sultan area (R. 69, 70). Later on in June, Mr. Castle said he asked Mr. Davisson why he had not hired Cook. Mr. Castle quoted Mr. Davisson as stating that Cook was a good man, that he would like to hire him, but there was no room for him on the crummy and that he did not want more men from Granite Falls because of the transportation problem (R. 71).

Testimony concerning Mr. Cook revealed that he is

and has been a power saw operator for eight years (R. 32), had been an employee of the W.R.W. Logging Company and still was in the employ of Wilmac Logging Company (R. 32), had seniority at Wilmac (R. 53), and had never worked for Scherrer and Davisson (R. 32). He, along with other members of the Wilmac crew, was in a lay-off status due to the fact that the Wilmac operation was closed in late fall of 1952 and had not resumed operations (R. 53). He was still constructively in the employ of Wilmac subject to call-back (R. 53).

Concerning Mr. Cook's employment, Mr. W. Davisson testified that in hiring new men, he did not wish to hire persons who were in the employ of other operators and who held seniority rights in other firms because such workers would when recalled to work by their employer, leave his Company, leaving him shorthanded, to return to their regular employment where they had seniority (R. 90). Mr. Davisson also mentioned that there was a general understanding or agreement among the operators in the area that they would not "steal each other's men" (R. 97).

The testimony also shows that Mr. Rawlins, who was employed at W.R.W., served on the union committee and was also then on picket duty (R. 63). Testimony further shows that Mr. Rawlins had worked for Scherrer and Davisson before and that during the second strike he was given temporary employment with Scherrer and Davisson (R. 63). Mr. Davisson offered Mr. Rawlins employment in 1953 (R. 63). Mr. Rawlins testified that it was in April, but he was uncertain as

to date (R. 63). Mr. Davisson testified that the offer was made about the 10th of May (R. 91), at which time Mr. Rawlins refused the employment stating that he could not leave Alex Cook (R. 91).

Mr. Rawlins and Mr. Cook in April made application to the State of Washington for a permit to log lands belonging to Mr. Cook and on May 5, after they had spent considerable time examining and testing the donkey to use in their logging operation, they purchased it from Mr. Huswick. Although Mr. Rawlins attempted to explain away their planned business venture by saying they intended logging for themselves only when they were not otherwise gainfully employed (R. 66), he nevertheless rejected employment offered to him by respondent on May 10, 1953, saying:

> "at that time I refused the job. I told him why. That I couldn't leave Alex alone." (R. 66)

With reference thereto, Mr. Davisson testified as follows:

> "I went to get him to come to work and Mr. Rawlins told me that he and Mr. Cook were working for themselves, taking out pulp wood, and until Mr. Cook found employment some place else he couldn't leave him." (R. 91)

Mr. Cook denied that he and Rawlins were going to gypo (R. 44), but when faced with State Permits (R. 44, 45, 46, 47, 48, 49), had to admit the facts.

Mr. Davisson testified that rigging men were hard to find at any time and they usually hired good rigging men wherever they could find them, but that a cutting crew was easier to pick up (R. 92).

Mr. Castle, witness for general counsel, testified that after Mr. Cook applied for work the company hired the following individuals: Tom Stalnaker (R. 72), Frank Brush (R. 72, 73, 74), Ralph Dexter (R. 73, 74), Devon Russell (R. 73, 74, 75) and Leonard Treen (R. 73, 74, 75). His testimony was hearsay, but Mr. Davisson who testified from the time books of the Company, testified that Mr. Stalnaker was hired on May 8, 1953, and picked up in Sultan (R. 93). Earl Enderson lived in the Sultan area and was picked up in Sultan (R. 93). Mr. Russell was likewise picked up in Sultan, as was Mr. Treen. Ralph Dexter was a former employee on leave because of his military duty and taken back upon being discharged from the Army (R. 92). Frank Brush, who lived in Granite Falls, was on the rigging crew and was hired in May (R. 92). To summarize, four of the six employees lived or were picked up in the Sultan area and of the two who resided in the Granite Falls area, one was a rigger, which is a job classification difficult to fill at any time, and the other was a former employee with seniority rights who had been rehired by the Company upon his discharge from the Army (R. 91, 92, 93).

Testimony shows that in the spring of 1952 beginning in April, there was an industry-wide strike which extended until the end of June. The testimony also shows that after the end of this strike, the union called a strike at Wilmac Logging Company and W.R.W. over some local issues (R. 36, 37).

The only testimony as to union activity, if any, on the part of Mr. Cook is that in 1952 he served as Vice-

President of the Local Union, was a shop steward at Wilmac, and that he was on the union safety committee (R. 36, 37).

Roberts, a brother-in-law of Alex Cook, testified to an alleged conversation with Oscar Scherrer. According to Mr. Roberts, he and Mr. Scherrer were eating lunch at the logging operation at which time no other person or persons were present within hearing distance (R. 77, 78, 79). He stated that Mr. Scherrer voluntarily and without provocation (R. 79) said that he would not hire Alex Cook because:

> "He was too active in the union and he was afraid if he hired Cook that Alex would cause his men to go on strike. And he had heard around the country that Alex Cook was the cause of all the strikes and that it happened before." (R. 77)

Roberts further testified that one afternoon while Mr. Scherrer was working helping him, Roberts, chase on the cold deck, Mr. Scherrer voluntarily stated that he would not hire Alex Cook because Alex Cook was "too active in the union" (R. 78).

Oscar Scherrer denied both of these alleged conversations (R. 13, 14, 109). Mr. Scherrer specifically stated that he never engaged in conversations with Mr. Roberts about employing anyone or that he ever said he would not allow his Company to hire Alex Cook; that he never referred to union activities on the part of Alex Cook and that his Company had never refused employment to anyone because of union activities (R. 13, 14, 109).

Roberts testified to an alleged conversation with

William (Red) Davisson about a week before the Company hired Roberts. This conversation is alleged to have taken place one evening at the home of Mr. Davisson, and according to Roberts, Mr. Davisson stated:

> "He would like to hire Alex Cook, but he could not because his partner would not let him." (R. 81)

Mr. William (Red) Davisson denied that he had ever had a conversation with Mr. Roberts regarding Mr. Cook (R. 111, 112).

Mr. Cook testified to a second conversation with Mr. William Davisson some time late in April or early in May. His testimony with regard to the date was very indefinite and uncertain. He stated that he and Mr. Rawlins had been looking at a donkey; that they were returning to their homes, each in his own car. When he arrived in front of Mr. Davidson's house he saw Mr. Rawlins' car parked in the driveway and that he, Cook, stopped his car on the roadway, got out and got into Mr. Rawlins' car. Mr. Cook testified that Mr. William Davisson and Mr. Rawlins were talking when he got there. Cook stated that he, at that time, asked Mr. Davisson if he was going to have a job for him, and said Mr. Davisson

> "started to make excuses that the rigging was still on, and that he didn't have any need, he said the snow was pretty deep yet up on the hill."

Cook then said that he asked Davisson if it was not because of the "trial at Wilmac," to which he alleged Davisson replied:

> "That is the whole damn thing." (R. 36, 37)

Mr. Rawlins' testimony on this point and this conver-

sation was substantially the same, except that he quoted Mr. Cook as saying:

> "I think it looks to me that Mackie has got something to do with it, and as near as I remember the words, Mr. Davisson said 'I know damn well he has'." (R. 59, 60)

The time of this alleged meeting or conversation with Mr. Davisson is pretty well fixed by Mr. Rawlins' testimony that it took place the day they purchased the donkey (R. 69), which, according to Mr. Huswick, the individual from whom the donkey was purchased, was May 5, 1953 (R. 116, 117). Mr. Rawlins testified further that Mr. Davisson never said that he would not hire Cook because of Cook's union activities (R. 66). Both Mr. and Mrs. Davisson denied that Mr. Cook ever got out of his car and into Mr. Rawlins' car (R. 88, 89). Mr. Davisson denied that he ever had a conversation with Cook on this occasion and specifically denied having ever made the above statement (R. 88, 89, 90).

The trial examiner further found that Davisson came to Rawlins' home in early April and said that Rawlins could not be hired "because of the union activity, because of that strike." Mr. Davisson denied this statement charged to him (R. 91). Mr. Rawlins testified:

> "A. I asked him (Davisson) if he could give me a job this year. And he said, I don't see why not." (R. 55)

Rawlins, who had worked for respondent in 1950 and 1952 (R. 54), also testified that Davisson told him if he would sever his employment with W.R.W. respondents would hire him (R. 58), and that he subsequently refused employment offered by respondent because he

and Mr. Cook were logging on their own and he *"wouldn't be able to work for him (respondent) until such time as Mr. Cook got a job because I couldn't leave him (Cook) alone"* (R. 60) (Emphasis supplied.)

SUMMARY OF ARGUMENT

No order of enforcement should be issued where the findings of the Board are not supported by a preponderance of substantial evidence. The test of substantiality requires that the Board and the Court consider the record as a whole. It is not enough that there is some testimony in the record which supports the findings made by the Board. The court must weigh against such testimony and evidence other testimony and evidence which detracts therefrom.

In the instant case the Board relied solely upon disputed testimony and evidence to support its findings. The Board did not weigh against this disputed testimony and evidence undisputed testimony and evidence. The Board's conclusions are predicated upon "suspicion, surmise, implications or plainly incredible evidence."

ARGUMENT

A. Preponderance of Substantial Evidence Required.

Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Section 151 *et seq.*) insofar as relevant provides:

> "* * * If upon a preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in * * * an unfair labor practice, then the Board shall state its findings of fact and shall issue * * * its order."

Section 10(e) specifically states:

> "The findings of the Board with respect to questions of fact *if supported by substantial evidence on the record considered as a whole,* shall be conclusive." (Emphasis supplied.)

These sections are explained in the Joint Conference Report as follows:

> "In Section 10(c) the House Bill provided that the Board should base its decision upon the weight of the evidence. The Senate amendments retain the present language of the Act, permitting the Board to rest its orders upon all the testimony taken. The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony—that is to say, *on the weight of the credible evidence.* Making the preponderance test a statutory requirement will, it is believed, have important effect. For example, the evidence could not be considered as meeting, the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet the test otherwise. Again the Board's decisions *should show on their face* that the statutory requirement has been met —*they should indicate an actual weighing of the*

> *evidence setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, or drawing this inference rather than that.* Immeasurably increased respect for decisions of the Board should result from this provision." (Conference Report, House Report 510 80th Congress, Page 53, 54) (Emphasis supplied).

Conversely, decreased respect will result when the above provision is not followed.

The question as to what constitutes substantial evidence has been before the Supreme Court of the United States on various occasions and the rule is very well established. In *Washington V. & M. Coach Co. v. Labor Board,* 301 U.S. 142, the court said:

> "Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

See also *Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229.

In *Labor Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, the Supreme Court said substantial evidence is evidence which

> "must do more than create a suspicion of the existence of the fact to be established * * *. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

In *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 478, it was held that the test of substantial evidence is not met

> "when the reviewing court could find in the record

> evidence which, when viewed in isolation, substantiated the Board's findings."

And again in referring to the legislative history of the Administrative Procedures Act and the National Labor Relations Act and stating that the legislature, while reaffirming the "substantial evidence" test, made it unequivocally clear that they disapproved

> "of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications or plainly incredible evidence' and indicated that the courts are to exact higher standards 'in the exercise of their independent judgment' and on consideration of 'the whole record'." *Universal Camera Corp. v. NLRB,* 340 U.S. 474-483, 484.

And further the court said:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488.

and further:

> "We conclude, therefore, the Administrative Procedures Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of the Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed upon them a responsibility for assuring that the Board keeps with reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appears substantial when viewed, on the record as a whole,

> by courts invested with the authority and enjoying the prestige of the courts of appeal. *The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before the court of appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490. (Emphasis supplied.)

As will be shown, the above principles, rules and tests were not applied by the Trial Examiner or the Board in this case.

B. Trial Examiner's and Board's Findings Not Based on Preponderance of Substantial Evidence.

The Trial Examiner stated:

> "I find the testimony of general counsel's witnesses to be convincing." (R. 14).

By this statement it can only be assumed that he relied upon the testimony of all such witnesses. Such is not the case.

Vern Castle, the Union Business Agent, testified, regarding the company's failure to hire Cook, that Mr. William Davisson of the company said:

> "Cook was a good man, that he would like to hire him, but there was no room for him on the crummy and that he did not want more men from Granite Falls because of the transportation problem." (R. 71).

This testimony of the Union Business Agent is almost word for word identical to the testimony of the witnesses called by the Company. It bears directly on the

fundamental issue in this case. Neither the Trial Examiner nor the Board gave any weight or consideration to this testimony which conformed to respondent's testimony. This testimony is entitled to greater weight than the self-serving testimony of Mr. Cook, an interested party and his friend, Mr. Rawlins. The Trial Examiner gave no weight to the testimony of Vern Castle that the Company had inquired of him as to available power saw operators and that he, Vern Castle, had told the Company there should be some in the Sultan area. The admission of the Union Business Agent on direct examination that he had referred Mr. William Davisson to available men in the Sultan area is subject to but one inference, that is, that the Company had inquired regarding the available men in that area.

Again in the intermediate report, the Trial Examiner said:

> "I am persuaded that Cook's strike activity did engender resentment and a disposition to retaliate in some quarter and that influence was brought to bear upon respondent to refuse him employment." (R. 14).

What strike activity? The record is silent on any strike activity on the part of Cook. The only testimony is that Cook was Vice-President of Local 23-93 in 1952, served on the union safety committee and was Union Shop Steward (R. 36, 37). There is no testimony of anything done or said by Cook to show, or attempt to show, that Cook engaged in any particular strike activity. The only testimony with reference to a strike was that in 1952 starting in April there was an industry-wide strike participated in by all the logging employees in

the Northwest. The only other testimony with reference to a strike is that two of the logging operators in the Granite Falls area were on strike in the fall of 1952 over some local issues. There is no showing as to who called the strike; there is no showing that Cook took part in any unusual union activity. There is no showing that respondents were informed of or had reason to know anything concerning Mr. Cook's alleged union activities. Cook had no dealings with Scherrer and Davisson of or concerning the industry-wide strike (R. 5). The undisputed testimony is that

> "Mr. Mackie did not prevail upon Mr. Scherrer not to hire Mr. Cook (R. 97).

Thus when the Trial Examiner said that Cook engaged in strike activity which "engendered resentment" against him, the Trial Examiner is not relying upon the record but the figment of his imagination, surmise and conjecture.

Cook returned to his regular employment after the strike and worked until the winter shutdown (R. 53). He was still employed by Wilmac and subject to call back to work when he allegedly applied for work with the Company (R. 53). The Trial Examiner's conclusion that Cook was not hired because of union activity is a deduction made by him without support of substantial evidence. Under no circumstances can it be said to be based upon a fair appraisal of the entire record or a preponderance of substantial evidence.

The Trial Examiner relied heavily upon the testimony of Messrs. Rawlins and Cook, quoting Mr. Davisson as admitting that

"Wilmac had something to do with Cook's inability to get on respondent's payroll."

This alleged admission was denied by Mr. Davisson (R. 88). In accepting Cook's and Rawlins' version, the Trial Examiner did not find or attempt to recite his reasons for disregarding Mr. Davisson's denial. The Trial Examiner did not weigh against this self-serving testimony of Mr. Cook and his friend Mr. Rawlins the objective facts, to-wit:

1. That Cook had never been in the employ of the Company (R. 32).
2. That Cook was still in the employ of Wilmac Logging Company, held some three-year seniority at Wilmac and was subject to call-back to work when they started logging (R. 53).
3. That Cook lived over fifty miles from the Company's logging operations (R. 32, 33, 41).
4. That the Company was only operating one crew truck from Granite Falls and wanted to get away from the transportation problem (R. 41, 42).
5. That the Company wanted to hire only new men who lived in Sultan or in the Sultan area near the Company's logging operation (R. 41, 69, 70, 87).
6. That William Davisson went to Vern Castle, the Business Agent of the Union, and inquired about available power saw men (R. 69, 70).
7. That the Company wanted men who would be available for the season and did not want to hire men who were employed elsewhere, held seniority rights elsewhere, and who would leave the Company's em-

ployment and return to their regular job when called (R. 90).

8. That Cook and Rawlins were logging on their own, had just purchased a donkey (machine) to use in their logging operation (R. 61).

9. That Rawlins, who had worked for the Company before, refused employment with the Company in April or May, 1953, because he and Mr. Cook were engaged in logging together and he would not leave Mr. Cook alone (R. 60-63).

The Trial Examiner also relied upon the testimony of Mr. Roberts, to-wit: That Mr. Scherrer, one of the partners, "out of a clear sky" and without provocation, knowing Roberts to be a brother-in-law of Cook, said the Company wouldn't hire Cook because of his alleged union activities (R. 79). It is to be noted that although both conversations allegedly took place at the operation, no one else was around to hear them. One of these alleged admissions is supposed to have taken place on the cold deck at the landing while Mr. Scherrer was helping Mr. Roberts, a young inexperienced man, do his work (R. 78). If Roberts needed help so badly that one of the partners had to pitch in and help him, it is absurd to think that a statement on a collateral subject, especially alleged union activities of Mr. Cook, was made by Mr. Scherrer. The Trial Examiner tried to overcome the obvious conclusion, not by a finding that Mr. Scherrer was not a credible witness, or that his denial (R. 109, 110) in the light of all the circumstances was an obvious falsehood, but by saying that Mr. Scherrer was an indiscreet individual (R. 14, 15).

There is nothing in this record to support the Trial Examiner's conclusion of "indiscretion." The Trial Examiner and the Board did not look to or consider related objective facts; they did not consider substantial evidence or base their conclusion upon a preponderance of the evience.

The Trial Examiner found that Cook resided in Granite Falls, but that this was "no obstacle to his hire" and states that other men were hired who lived in Granite Falls. The testimony showed the Company only operated one crew truck from Granite Falls (R. 71); that the Company wanted to get away from the transportation problem (R. 87), that Cook owned his home and considerable land near Granite Falls (over fifty miles from the Company's logging operations) (R. 32, 34), that he and Rawlins were engaged in logging Cook's land, and that on May 10, 1953, Rawlins, who had worked for the Company before, refused employment with the Company because he and Mr. Cook were logging on their own and he "couldn't leave Cook alone" (R. 60, 91); that Cook held seniority and was still employed at Wilmac Logging Company (R. 53); that the Company did not want to hire men who were employed elsewhere and subject to call-back to work and who in all probability would return to their regular job when called, thus leaving the Company short-handed (R. 90).

While the Trial Examiner and the Board said "others" were hired from Granite Falls area (R. 15), they did not state all the facts. Six men were hired after May 10th. Four lived in or were picked up in the vi-

cinity of Sultan (R. 92, 93). Two were from Granite Falls (R. 92), one of whom was an employee just discharged from military service and re-instated to his job (R. 92), to which he was entitled both under the union contract and the laws of the United States. The other man who was hired and lived in the vicinity of Granite Falls was hired for the rigging crew (R. 92). The rigging crew men were hard to find (R. 92).

The Trial Examiner found that Cook had not removed himself from the labor market by logging his own land. Cook and Rawlins also logged other land (R. 44, 45, 46, 47, 48, 49). Rawlins on May 10th refused employment with the Company on the ground he couldn't leave Cook alone (R. 60, 91). It is perfectly clear that Cook and Rawlins were in together and that neither one would leave the other unless both had obtained gainful employment acceptable to them. In accepting Cook's self-serving declaration that he would only log for himself when he was not employed, the Trial Examiner again demonstrated that he was not predicating his findings upon substantial evidence.

The Trial Examiner found that Davisson went to Mr. Rawlins' home early in April and told Rawlins he would not be hired

> "because of the union activity, because of the strike." (R. 11)

Mr. Davisson denied this (R. 90, 91). This testimony is not only irrelevant and immaterial and prejudicial, but outside of the scope of the complaint. It is also so unbelievable as to be unworthy of mention. It is beyond the realm of reason to believe that an employer would seek

out a prospective employee for the purpose of volunteering such a statement, the effect of which could only be too well known to the employer. The same applies to Mr. Davisson's alleged statement that it appeared as if "they were trying to starve Rawlins and Cook out." Both statements were unequivocally denied by Mr. William Davisson (R. 90, 91). Again the Trial Examiner and the Board chose to rely upon disputed testimony and failed to weigh against it undisputed facts and circumstances existing at the time. All of the facts and circumstances shown by undisputed evidence weighed more heavily in favor of respondents' position and testimony than that of Mr. Rawlins or Mr. Cook.

We submit that the conclusions drawn by the Trial Examiner and the Board from the evidence and testimony in this case do not meet the standards laid down in *NLRB v. Citizens News Co.,* 134 F.(2d) 970 (C.A. 9), wherein the court said:

> "In considering this question it should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance. The mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act. That there must be more than mere discharge is clearly recognized by the Board in its findings * * *. Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.
>
> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a dis-

> charge as the result of such activities. There must be more than this to constitute substantial evidence."

Applying the statement made by this court in *NLRB v. Citizens News Co.,* 134 F.(2d) 970 (C.A. 9), to the instant case, which involves an alleged refusal to hire, and bearing in mind that the right to employ or not to employ is just as important a constitutional right as the right to terminate employment, the court's language may be paraphrased as follows:

> The fact that a person may be engaged in labor union activities long prior to the date he applied for work with another employer and without a showing that the new employer had knowledge of such alleged prior union activities, taken alone, is no evidence at all of a refusal to hire as a result of such activities. There must be more than this to constitute substantial evidence.

The record in the instant case shows no union activities of Mr. Cook other than that while employed elsewhere and prior to 1953 he was an officer of the local union and served on union committees and that he along with all other workers represented by the International Woodworkers of America in the Pacific Northwest, engaged in an industry-wide strike and that the operation at which he was employed and one other operation were on strike a second time in 1952 over the union shop demand. There is not a single bit of evidence in this record to show that Mr. Cook engaged in any unusual union activities or that respondents here knew of or knew what Mr. Cook's union activities were in fact or were supposed to have been. The holding of the Trial Examiner that it was because of Mr. Cook's union ac-

tivities that the respondent did not hire him assumes that Mr. Cook was engaged in union activities which were distasteful to his employer at the time and that the respondents herein were informed and advised of such union activities and that because thereof they declined to hire Mr. Cook. It is obvious that the conclusion drawn by the Trial Examiner is predicated upon suspicion, surmise, implications and plainly incredible evidence.

CONCLUSION

By way of conclusion it is respectfully submitted that a preponderance of the substantial evidence in the case establishes beyond a shadow of doubt the following facts:

1. That the Company is a partnership and all of the partners had been union members and in many cases active in union affairs.
2. That the Company's employees have consistently been 100% members of the union.
3. That the Company and the Union had a working agreement under which grievances were to be handled and the union at no time followed the grievance procedure on Mr. Cook's claim.
4. That the Company's logging operation was located near Sultan, Washington, over fifty miles from Granite Falls.
5. That the Company in seeking new employees went to the Union Business Agent to inquire as to available power saw men in the Sultan area.
6. That the Company was operating one crummy from Granite Falls to its logging operation and wanted to get away from the problem of transporting employees, and therefore, was seeking new employees from the Sultan area.

7. That in hiring new men the Company wanted men who were not regularly employed elsewhere and who wouldn't leave the Company when their regular job opened up and they were called back to work.
8. Mr. Cook was regularly employed at the W.R.W. Logging Company in Granite Falls and although in a lay-off status because of the seasonality of logging, held seniority and other employment rights and was subject to call back to work upon resumption of operations by W.R.W. Logging Company.
9. That Cook lived in or near Granite Falls, over fifty miles from the Company's logging operation, owned his own home, was engaged in logging as a partner with Mr. Rawlins, that neither Cook nor Rawlins would accept employment unless both were employed.
10. That men hired after Mr. Cook applied and after Mr. Rawlins informed respondent that he and Cook were logging on their own and for that reason refused employment were men from the Sultan area in that of the six hired, four lived in or near Sultan, or were picked up in Sultan. Of the two from Granite Falls, one was an employee of the Company who had been on leave for military duty and reinstated to his former employment when discharged by the Army; that the other man who lived near Granite Falls was on the rigging crew and rigging crew employees were hard to find.

All of the foregoing facts are established by undisputed testimony and evidence. None of the foregoing undisputed facts were weighed by the Trial Examiner or the Board against the disputed testimony upon which both relied to support the conclusion that the employer had refused to hire Mr. Cook because of union activities.

The Trial Examiner and the Board failed to view the record as a whole and failed to take into account uncontroverted testimony in the record which detracted from the weight given by the Board to the controverted testimony relied upon by the Trial Examiner and the Board. The Board did not apply the rule of reasonableness laid down by *Washington V. & M. Coach Co. v. Labor Board,* 301 U.S. 142. The Board in adopting the Trial Examiner's findings failed to heed the dictates of the conference report (House Reports 510, 80th Congress, page 53, 54) wherein it is said the Board:

> "should indicate an actual weighing of the evidence setting forth reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, or drawing this inference rather than that."

The Board's conclusion is predicated upon "surmise, suspicion, implications or plainly incredible evidence" contrary to the rule laid down in *Universal Camera Corp. v. NLRB,* 340 U.S. 474.

It is not enough that this court when reviewing the record could find therein

> "evidence which, when viewed in isolation substantiated the Board's findings." *Universal Camera Corp. v. NLRB,* 340 U.S. 474.

The Board's findings cannot be supported by the record herein when considered as a whole.

We respectfully submit that the order of enforcement sought by the Board must be denied.

Respectfully submitted,

PATTERSON, MAXWELL & JONES,
Attorneys for Respondents.

No. 14463

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON LOGGING COMPANY, *Respondents.*

PETITION FOR REHEARING

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PETITION FOR REHEARING

To: THE HONORABLE ALBERT LEE STEPHENS, WILLIAM HEALY and WALTER L. POPE, Judges of the above entitled court:

The respondents above named respectfully petition the Court to grant a rehearing in the above-entitled matter and in support thereof respectfully show the Court as follows:

I.

The above-entitled case was argued in Seattle, King County, Washington, on the 25th day of April, 1955, before the Honorable Albert Lee Stephens, William Healy and Walter L. Pope, and the decision of the Court decreeing and directing the entry of an Order of Enforcement was filed herein on the 26th day of April, 1925.

II.

Respondents, by answer to the application of the National Labor Relations Board for an Order of Enforce-

ment and by the Brief of respondents heretofore filed herein, raised the objection that the decision of the trial examiner and the findings of the National Labor Relations Board and the trial examiner were not supported by a preponderance of substantial evidence.

III.

The *Per Curiam* Opinion filed herein states:

> "The evidence pro and con is in conflict throughout. That produced by the general counsel would, *if believed,* not only support but would conclusively establish the truth of the charge made against the respondents. But the latter contended that the testimony accepted by the Board is inherently incredible. We do not so regard it. *Thus we have before us merely a question of credibility, which is not one for this Court to resolve.*
>
> *"The findings of the Board are substantially supported by the record considered as a whole."* (Emphasis supplied)

IV.

It is respectfully submitted that the language of the Court's decision in this case quoted above raises substantial uncertainty as to whether the Court has rested its decision on the question of credibility alone or whether the Court did review the record as a whole and independently conclude that the Board's findings were supported by a preponderance of substantial evidence. While it is true that some of the evidence in the case is in conflict, it is likewise true that some of the evidence produced by general counsel supported the respondents' case and that the record is replete with evidence which is not in conflict.

While the decision concludes with the statement that

> "the findings of the Board are substantially supported upon the record considered as a whole,"

this conclusion can only be interpreted in the light of the preceding sentence, that is,

> "Thus we have before us merely a question of credibility, which is not one for this Court to resolve."

The specific statement that the question is one of credibility and therefore not one for this Court not only impeaches the final conclusion referring to the record as a whole but is clearly and unequivocally indicative that the Court's review of the record was limited to the credibility of the witnesses whose testimony was relied upon by the Board and further indicates that, since this question was uppermost in the Court's mind, the issue of whether or not the findings of the Board were supported by substantial evidence based on the record as a whole was not considered by the Court.

The statement of this Court in its decision that the question presented is one of "credibility" seems to conclusively infer that reference was made only to the testimony of General Counsel's witnesses upon which the Trial Examiner and the Board saw fit to rely to support the findings. The Board did not see or observe the witnesses. The Trial Examiner made no reference to undisputed evidence which preponderated against his ultimate findings. He made no reference to the demeanor of witnesses as affecting their credibility. He cited no reasons for not accepting undisputed testimony. He stated no reasons for not accepting Respondents' denials of General Counsel's witnesses whose testimony he obviously viewed in isolation. He did not weigh

against the testimony upon which he relied objective and undisputed facts in the record which substantially detracted therefrom. Thus he failed to follow and observe the mandates of Congress clearly set out in the Joint Conference Report (House Report 510 Eightieth Congress, pages 53, 54. See Respondents' Brief, pages 12 and 13).

"Credibility" is defined as "worthiness of belief." (Bouvier's Law Dictionary, Baldwin's Student Edition 1928).

The substantial evidence on the record as a whole test does include consideration of credibility of evidence. It requires the reviewing court to consider related facts such as circumstances under which alleged statements were made and undisputed facts as affecting the probable truthfulness of the alleged statements and the weight to be given thereto.

The test of substantial evidence is not met "when the reviewing Court could find in the record evidence which, when viewed in isolation, substantiates the Board's findings." The act requires all credible evidence appearing in the record as a whole to be considered and weighed. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 478.

The record shows the respondents were not anti-union. Mr. Cook had never been in the employ of respondents.

There is no evidence of union strike activity except that Mr. Cook, along with thousands of other workers throughout the Northwest, was on strike in 1952 and

that Mr. Cook along with employees of two companies, including the one for which he worked, participated in a strike over local issues. No special strike activity is shown on the record. The record fails to establish the necessary condition precedent to the issuance of an order of enforcement. *N.L.R.B. v. Citizens News Co.* (C.A. 9) 134 F.(2d) 970.

In conclusion, it is respectfully submitted that a rehearing should be granted herein for the reasons stated above.

PATTERSON, MAXWELL & JONES,
By R. W. MAXWELL,
Attorneys for Respondents.

Certificate of Attorney

R. W. Maxwell, of Patterson, Maxwell & Jones, attorneys for respondents herein, hereby certifies that in his judgment the Petition for Rehearing is well founded and that it is not interposed for the purpose of delay.

R. W. MAXWELL.

No. 14464.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. SHIBLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 14464.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

George E. Shibley,

Appellant,

vs.

United States of America,

Appellee.

APPELLEE'S REPLY BRIEF.

Background of the Case.

This case involves an appeal from a Judgment of Summary Contempt rendered in the United States District Court below against the Appellant George E. Shibley, an Attorney at Law. Appellant was on trial on charges of contempt of a United States Marine Corps Court of Inquiry. In the District Court Shibley was both defendant and his own counsel *in propria persona* and in addition was represented by counsel, one Daniel G. Marshall.

To understand how this contempt arose, it is necessary to develop the history of the entire proceedings so that a picture can be drawn wherein this particular contempt of the authority of a Court can be placed in its proper perspective.

In August of 1952, Shibley had been engaged as civilian counsel to represent a certain Master Sergeant Bennette who was in the process of being accused of certain serious infractions of the disciplinary regulations governing the conduct of the United States Marine Corps. At that time the Bennette case was at the pre-trial stage. Shibley took it upon himself to write an 18-page letter to the Commandant of the Marine Corps, accusing numerous high-ranking officers at El Toro Marine Air Station of personal misconduct, which, if substantiated, would have been the basis of severe disciplinary action against these officers. This letter, with its scandalous and scurrilous accusations, upon reaching the desk of the Commandant of the Marine Corps, was obviously something which could not be ignored in case there should by chance be any grain of truth in the accusations. As a result, the Commanding General at the El Toro Marine Air Station was instructed in effect to conduct an investigation into the charges made.

In the interim the Bennette case was progressing to trial, before a court martial sitting at El Toro Marine Air Station. On the day that that trial *concluded* at the court martial level, Shibley was still on the premises of the Air Station when he was served with a subpoena to appear before a Court of Inquiry convened to investigate the charges which he had made.

At the outset of the Court of Inquiry proceedings Shibley was advised of the nature of the inquiry, to wit, to investigate the charges made by Shibley against certain Marine personnel. He was advised that inasmuch as the primary accused in his letter was Lieutenant Colonel Endweiss, that officer would be designated as the interested party. From the outset of the examination of Shibley, he

refused to testify on the grounds of attorney-client privilege, privilege against self-incrimination, and many other alleged grounds for refusal to testify, including his challenge to the jurisdiction of the court, the composition of the court, and the designation of interested parties. Through the whole course of the Court of Inquiry all attempts to examine Shibley were fruitless, as each question was met by a long harangue on privileges and refusals to testify. It is true, as Appellant alleges, that at one point of the proceedings Shibley was told in effect "put up or shut up" as far as his accusations were concerned. At that point the Military Court of Inquiry was obviously completely disgusted with his attitude and his refusal to make any attempt whatever to substantiate the scandalous charges which he had made.

The result of that Court of Inquiry was that a number of unanswered questions were certified to the United States Attorney for the filing of an Information charging contempt of a Military Court of Inquiry as provided by law (50 U. S. C. A. 622). Subsequently the United States Attorney filed an Information charging contempt of the Marine Court of Inquiry on 9 counts, including both refusal to answer and refusal to appear at one stage of the Court of Inquiry proceedings. The offenses alleged each constituted a misdemeanor.

After the filing of a voluminous motion to dismiss directed to the Information, the matter was briefed at length and heard. Judge Yankwich rendered a very comprehensive and detailed opinion disposing of each of the legal objections raised by the defendant Shibley directed toward the validity of the Court of Inquiry, the power of the Court of Inquiry to cite him for contempt, the power of the Court of Inquiry to order his physical at-

tachment for failure to appear, and some number of other points.

Thereafter the case came to trial before Judge Carter, who initially expressed the view that the trial should be expeditious and simple, on what should have been the refined issues as to whether Shibley did or did not answer certain questions and whether he was subpoenaed and paid witness fees. Instead of what was anticipated would be a two- or three-day trial, this case was dragged on into five weeks. The Appellant recites the specific dates that the matter was heard in court but does not refer to the endless hours in chambers arguing the multitude of motions brought endlessly and repetitiously by the defendant, as his own counsel and through his counsel Marshall.

At the outset the Court advised Shibley that he must either proceed with his counsel, Marshall, or *in propria persona,* but that he could not have dual representation. Shibley elected to proceed by himself. On the second day of the trial, and before any significant proceedings had taken place, the Court reversed his ruling and permitted Shibley to appear both *in propria persona* and with counsel. This very novel situation as to legal representation set the stage for the events which were to follow.

Statement of the Case.

The appellant was brought to trial on October 20, 1954 under an Information charging the appellant with certain misdemeanors under the provisions of 50 U. S. C. 622. The Information was in nine counts, eight of which concerned alleged refusal to answer certain questions (the last directed to refusal to answer any further questions) and one count dealing with neglect and refusal

to appear at the Court of Inquiry after having been directed to do so. As to Count Three, dealing with failure to appear, there was an acquittal granted by the Court after the prosecution elected not to offer evidence on that count. Likewise counts eight and nine, dealing with refusal to testify, were similarly disposed of by the Court after election by the prosecution not to give evidence on those particular counts. The case was thus refined to six counts, each involving the asking of a particular question by the court of inquiry and a refusal to answer each of the questions. After trial the jury granted a verdict of acquittal on three counts and was unable to reach a verdict on the three remaining counts.

The chronology of the trial as set forth in appellant's statement of the case would appear to indicate that the prosecution and the defense both consumed approximately the same length of time in the trial of the case. An analysis of the record will show, however, that while eight trial days elapsed before the prosecution rested, most of that time was consumed in hearing motions by the defendant and in cross-examination. The direct testimony of the prosecution would have amounted to little more than one day's time.

After the conclusion of the trial on November 20, 1953, the Court ordered the matter of summary contempt be brought before the Court on November 23, 1953. Subsequently, the Court on its own motion continued the matter until December 7, 1953, and then again to December 28, 1953. The Court was unable to document its Certificate of Contempt prior to that time due to the voluminous character of the record (approximately 2500 pages) which had not been written up by the reporter. On December 28, 1953, the matter was continued to January

18, 1954, at the request of the appellant on the ground of illness.

The Certificate of Contempt [C. Tr. 670-685] sets forth the basis for the Court's ruling of Summary Contempt. For purposes of brevity that Certificate is summarized in this brief. In order to pin-point and particularize the events upon which the Certificate is based, appendices are contained in this brief pointing out the places in the record of proceedings where the particular events took place.

Summary of Argument.

The gist of the appellant's argument in this case is his contention that the evidence was not sufficient to warrant the use of the extraordinary power to punish for contempt. With this in mind they point to the Supreme Court decision in *Offutt v. United States* (Nov. 8, 1954), 348 U. S. 11, wherein the Court stresses the caution and self-restraint that should be used by District Judges in exercising their summary power to punish for contempt. The appellee has no argument with the *Offutt* case or any of the numerous other cases enunciating the same principle. The appellee does however disagree with the application of the law of that case to the facts before us here.

The *Offutt* case was one in which the District Judge permitted himself to give vent to his personal feelings and to lose the decorum and dignity expected of a Judge. In the instant case an examination of the record will

show that the Court exercised an extreme amount of patience in dealing with a man who was both defendant and lawyer and who revealed himself an expert in contempt of Court. The Judge not only had to resist well planned and vigorous efforts to take the control of the case out of his hands but also had to submit to personal abuse in the form of various charges of alleged misconduct on his part.

It is difficult for anyone not present in the courtroom during the days of this trial to read the cold record of printed words of transcript and brief and to visualize the sneering and contemptuous, and then again fawning, tactics of the appellant expressed not only in words but in manner of speech, gestures, and general demeanor. It is the position of the appellee that in evaluating this case the Court must not only examine the printed word but must try to recreate the atmosphere in which those words were spoken. Since to an extent this is impossible, this Court may assume, in the absence of direct evidence to the contrary, that the Trial Court reasonably evaluated those certain intangibles which were displayed in the performance before him.

It was only at the conclusion of the trial, and after the jury's verdict had been rendered, that the Trial Judge expressed his amazement that a jury could acquit the appellant on the counts charging contempt of the Marine Corps Court of Inquiry in light of the evidence given to the jury plus the fact that the appellant was giving the Trial Court the same treatment which he gave the Court

of Inquiry. Even then it was not a case of expressing personal animosity toward the appellant. In fact the record is replete with instances where the Court pleaded with appellant to let his counsel handle his defense so that he would not make himself look so bad in the eyes of the jury. Before the jury, the Trial Court exercised a great deal of caution in everything that was said to prevent anything being done that would be prejudicial to the appellant's interest. It should be noted that the comments of the Court, of which appellant complains, are nearly entirely those made out of the presence of the jury or after completion of the trial, and always at times when the jury could not be prejudiced by anything that was said. Those remarks merely revealed the Judge's feelings as to the conduct of the case which he so admirably concealed from the jury during the trial.

The appellant has likewise complained that the Trial Judge disqualified himself from ruling on the question of summary contempt. Who can better evaluate the conduct of an individual, both as to the spoken word and as to actions, than the Court before whom those events took place? No other Court, or jury, could accurately measure what took place in that courtroom, unless perhaps they had a sound motion picture of the events.

It remains the position of the appellee that while the acts of contempt were fixed in the Court's mind at the end of the trial, and he had in fact actually cited the appellant at several points in the record, the delays in preparing the Certificate of Contempt were reasonable in the circumstances and that jurisdiction was not thereby lost. Further, judgment was not entangled with any personal feelings against the appellant.

Summary of Certificate of Contempt.

The certificate *re* contempt of George E. Shibley, an attorney, is found at page 670 of the record and can, we believe, be summarized as follows:

I [C. Tr. 670].

Introductory paragraph.

II [C. Tr. 670-677].

This paragraph sets forth in detail the fact that despite the rulings of Judge Yankwich on the merits of the case, and despite the admonitions of the Court, Shibley, and his attorney Marshall, acting in concert, continued to make lengthy and oral motions on points which had previously been discussed and ruled upon. This paragraph further recites that despite the fact that the Court attempted to limit the objections to simple statements of the points to be raised, Shibley insisted upon making lengthy and wordy objections and to make the same objections over and over again.

III [C. Tr. 677].

This paragraph alleges that the acts complained of in Paragraphs IV to XIV of this certificate were deliberately done in bad faith for the purpose of impeding, hindering, obstructing and delaying the progress of the trial, for the purpose of interfering with the administration of justice, for the purpose of harassing the Court, and for the purpose of showing and expressing the contempt of George E. Shibley for this Court and for the judicial process.

IV [C. Tr. 677-678].

Paragraph IV incorporates Paragraphs I and II and recites that the many motions and objections concerning

issues and matters which had theretofore been ruled on were unnecessary for the preservation of the point in the record; that these motions and objections were made after the Court had cautioned him that the Court had ruled on these matters before; that he made repetitious, unnecessary and improper offers of proof; that he impeded, obstructed, hindered and delayed the trial by such conduct; and that he interfered with the administration of justice by such conduct.

At this point the Court points out that an inspection of the entire record is necessary in order to see the nature and extent of such conduct. (This is believed to be very important and Appendix "A" attached to this brief pinpoints much of this conduct in the very voluminous record.)

V [C. Tr. 678-679].

This paragraph deals with the events of October 29, 1953 [R. Tr. 802-808], when the Court felt that appellant was deliberately stalling the proceedings near the end of the day and then Shibley engaged in an emotional scene before the jury which finally forced the Court to adjourn the proceedings for the day.

VI [C. Tr. 679].

This paragraph deals with an accusation by Shibley of misconduct on the part of the Court for permitting certain Marine Corps lawyers who were present in the courtroom to attend an open session of the court in chambers when the proposed instructions for the jury were discussed [R. Tr. 1809-1811; see Appen. B].

VII [C. Tr. 679-680].

This paragraph deals with the events of November 18, 1953 [R. Tr. 2320; see Appen. C], wherein Shibley accused the Court of intervening on behalf of the Assistant United States Attorney and "constant interference with the defense in aid of the prosecution, and constant failure to protect the defendant in this case."

VIII [C. Tr. 679-680].

This paragraph alleges that Shibley accused the Court on November 18, 1953 [R. Tr. 2320; see Appen. C], of "indicating a serious bias and prejudice against me (Shibley) and a serious bias and a prejudice in helping Mr. Deutz."

IX [C. Tr. 680].

This paragraph deals with Shibley's conduct on November 18, 1953, particularly as to the portion of the record quoted in the certificate at page 680 of the record, wherein Shibley's very contemptuous language refers to his actions while absent from the courtroom [R. Tr. 2321-2322; see Appen. "D"].

X [C. Tr. 680].

This paragraph alleges that despite the admonitions of the Court that there was no issue in the case as to the truth or falsity of certain charges Shibley had made against officers of the Marine Corps, and that Shibley would not be permitted to argue that issue, Shibley did, on November 18, 1953, repeatedly argue this matter to the jury [R. Tr. 2290, 2300, 2303, 2304, 2305].

XI [C. Tr. 681].

This paragraph deals with the accusations of Shibley on November 19, 1953, that the Court over-emphasized

reading of portions of the instruction dealing with guilt of the accused and on the other hand gave no emphasis to instructions dealing with lack of guilt of the accused [R. Tr. 2471-2472, 2476; see Appen. "E"].

XII [C. Tr. 682].

Paragraph XII deals with the events of November 20, 1953, wherein Shibley pursued the course of conduct set forth in Paragraphs II and IV of the Certificate *re* Contempt and made objections and took exceptions after the Court had ruled [R. Tr. 2514 *et seq.*].

XIII [C. Tr. 682].

This paragraph deals with the colloquy occurring in court on November 20, 1953, between the Court and Shibley in the absence of the jury wherein after being cautioned about repetitive statements by Shibley and the fact that he had pursued the same course of conduct before the Court of Inquiry, Shibley accused the Court of using an angry tone of voice and "looking at me in what appears to be a malevolent and angry way" and assigning the same as prejudicial error and misconduct [R. Tr. 2544; see Appen. "F"].

XIV.

This paragraph deals with the events of November 20, 1953, where Shibley assigns as error the fact that the United States Attorney and one of his Assistants took their place at the counsel table with the Assistant United States Attorney who had been trying the case. Shibley alleged that that conduct was done "to further impress or put pressure upon this jury to find some sort of verdict against the defendant" [R. Tr. 2546-2547].

ARGUMENT.

POINT I.

Appellee Contends Evidence Was Sufficient to Warrant the Exercise of Power to Punish for Summary Contempt of Court.

The discussion under appellant's Point I is a mixture of an attack on the sufficiency of the evidence to support punishment for summary contempt and an attack on the procedure the Court used in deferring the preparation of his Certificate of Contempt until some 38 days after the close of the trial. This latter discussion appears also to be the substance of appellant's Point II and for that reason the appellee will confine its discussion of the procedural aspects of the contempt to its reply to Point II and will limit its reply to Point I to a discussion of the evidence supporting the finding of contempt.

Appendix "A" to this brief sets forth many, but not all, of the numerous instances of repetitious objections, harassing motions and general unlawyer-like conduct referred to in Paragraph IV, and elsewhere, in the Certificate of Contempt. Certain of the other particular paragraphs of the Certificate of Contempt are supported by independent appendices which will be cited elsewhere in this brief.

As to the scope of the search to be made by the reviewing court of the record to see whether or not the holding of summary contempt can be sustained, attention is called to the decision of this Court in *Hallinan v. United States* (9 Cir.), 182 F. 2d 880, at 882, wherein the Court said:

> "We realize the inadequacy of the cold record to fully present the situation as it existed in the courtroom during the turbulent times portrayed by this

record. We do note an attitude of patience and forebearance on the part of the Trial Judge which continued until the authority of the Court was so flagrantly and openly defied that the contempt judgment was justified and merited if not openly invited."

Again at page 88 this Court made the following statement:

> "We cannot have the same appreciation of an existing situation, from a review of a cold record, as does a presiding Judge who witnesses the transgressions and senses the unfavorable impact upon the orderly administration of justice. An officer of a Court has a higher duty to assist in maintaining the dignity and integrity of Courts than does the ordinary citizen. True, every lawyer, if he is worthy of the name, must use every legitimate effort in support of his client and in so doing will be relieved from an improper contempt judgment. *Caldwell v. U. S.,* 9 Cir., 1928, 28 F. 2d 684. No such condition exists here. The record reflects quite the contrary."

There are some acts of addressing a Court that are, *per se,* contemptuous. These statements coupled with the fact that "the Judge had full opportunity to observe the expression, manner of speaking, bearing and attitude of appellant" move a Court to say: "In the circumstances we cannot hold that no contempt had been committed." *Hallinan v. United States* (9 Cir.), 182 F. 2d 880, at 882.

With these standards in mind, we should now look to what the contempts that were committed here. Taking the Certificate of Contempt paragraph by paragraph we direct the Court to the specific contemptuous acts as follows:

As to Paragraph II of Certificate—Paragraph II coupled with Paragraph IV of the Certificate deal with situations where, despite the efforts of the Court to control conduct of the trial, the appellant, aided and abetted by his attorney and co-counsel, continued to make lengthy oral motions on points which had previously been discussed and ruled upon and despite the fact that the Court limited the objections to simple statement of facts to be raised, appellant insisted upon making lengthy and wordy objections and making the same objections over and over again. The Certificate further alleges that (Par. IV) these actions served to impede, obstruct, hinder and delay the trial by such conduct and to interfere with the administration of justice.

As the Court points out, it is necessary to review the entire record of this case before the trial court in order to picture what took place. Appendix "A" to this brief is an attempt to boil down this record to show a few of the many instances where these actions occurred. It should be noted that starting in Volume I of the transcript [R. Tr. 27] the Court indicated that he intended to follow Judge Yankwich's rulings on the motion to dismiss which determined most of the legal points involved. Shortly thereafter the Court suggested that all other extensive motions should be in writing. Thereafter there were not only extensive motions in writing but extensive motions made orally. Some idea of what was to come was revealed by appellant's request that 114 different *voir dire* examination questions be asked of the jury. Then in the opening argument [R. Tr. 150] the Court had to admonish the appellant that the *Bennette* case was not an issue before the Court. The matter had been previously discussed in detail out of the presence of the Jury. Again

and again during the course of the opening argument [R. Tr. 151, 152, 157, 158, 163] the Court admonished appellant not to discuss the *Bennette* case or appellant's charges against the Marine Corps.

In Volume II of the reporter's transcript [R. Tr. 181-183] the Court, out of the presence of the jury, again pointed out what argument he would permit and what questions of law and fact were to be covered [R. Tr. 185-190, 200]; thereafter the Court had to again admonish appellant for raising new arguments on points that had been ruled upon and particularly for doing so when the case was ready for trial [R. Tr. 227]. Finally the Court [R. Tr. 228] referred to appellant's conduct as "unlawyer-like."

In Volume V of Reporter's Transcript [R. Tr. 557] reference will be found to the fact that appellant had taken two days to cross-examine a "form witness" who had merely been brought into the case to introduce a document into evidence, and who had not testified to any of the matters that were the heart of the information.

Again and again, as the Court will read the outline of the events that transpired (as shown in Appendix "A"), it will be seen that appellant completely disregarded directions of the Court. Time and time again the Court had to admonish him in that regard. It should be noted, however, that most of these admonitions were made out of the presence of the jury and that the Court took great care not to say anything before the Jury which would serve to indicate that the Court felt that appellant was not conducting himself in a lawyer-like manner.

It is felt that the record of proceedings taken as a whole, particularly as outlined in Appendix "A," amply

supports the findings of summary contempt as set forth in Paragraphs II and IV of the Court's Certificate of Contempt.

As to Paragraph III—Paragraph III alleges that the acts complained of in Paragraphs IV and XIV of the Certificate were deliberately done in bad faith for the purpose of impeding, hindering, obstructing, and delaying the progress of the trial, for the purpose of interfering with the administration of justice, for the purpose of harassing the Court, and for the purpose of showing and expressing the contempt of George E. Shibley for the Court and the judicial process. It is believed that the deliberateness of the acts is obvious from the reading of the record particularly in light of the fact that appellant himself was an experienced lawyer and that he had present with him in court at practically every stage of the proceedings, his attorney Daniel G. Marshall, a lawyer of wide experience. The acts themselves are discussed elsewhere with reference to other paragraphs of the Certificate.

As to Paragraph V—The events set forth in Paragraph V of the Certificate occurred on October 29, 1953 [R. Tr. 803-807]. At this point appellant put on a dramatic emotional scene before the jury, which cannot be captured in the words of the printed record, but which was obvious to all concerned as a deliberate attempt to stall the proceedings for the rest of the day. Attorney Marshall had been excused from court for that day and when appellant reached a point where he was not prepared, or did not wish to examine the witness further, he tried to terminate the court session. When the Court refused to terminate the proceedings at that point, appellant then staged his emotional scene largely in the form of gestures

and near-tears. Finally the Court was forced to give in and adjourn the proceedings for the day.

As to Paragraph VI—The events on this occasion are set forth in Appendix "B" [see also R. Tr. 1809-1811]. Shibley accused the Court of misconduct for having suggested, in friendly fashion (and out of the presence of the jury), that certain Marine Corps officers who were in court, and who were known to the Court to be lawyers, attend an open session in chambers where proposed instructions for the jury were to be discussed. The matter was heard in chambers merely as a matter of comfort and convenience. Appellant's secretary and friends were not invited to attend but on the other hand neither appellant nor his counsel gave any indication of the fact that they wanted them to sit in on the proceedings. The Court quite obviously extended his invitation to the Marine attorneys merely because they were lawyers and felt that they might be interested in observing the Court's instruction procedure.

As to Paragraph VII—This paragraph deals with the events of November 18, 1953, which are set forth in Appendix "C" [also R. Tr. 2320]. Here appellant accused the Court of constantly intervening on behalf of the United States Attorney and constantly failing to protect the defendant in the case. An examination of the record will show that this simply is not true. The Court leaned over backward in attempting to give the appellant a fair trial despite his actions and many times made rulings adverse to the prosecution which, in any case other than a criminal one, would have been reversible on appeal. Appendix "G" sets forth a few of the many instances where the Court attempted to aid appellant in his defense. It is believed that this Court will fail to find anywhere in

the record any rulings in favor of the prosecution which were other than in strict conformity with the law. On the other hand the Court below stretched the law on many points in permitting appellant to go far afield in the evidence merely because appellant assured the Court that he would show bias and prejudice of witnesses thereby. No such personal bias or prejudice was shown or otherwise seriously contended.

Paragraph VIII—Paragraph VIII covers an accusation by appellant of bias and prejudice in helping the Assistant United States Attorney. These charges are based on much the same transactions as those found supporting Paragraph VII of the Certificate (see Appendix "C"). As stated above, it is felt that no such bias and prejudice is shown but rather that the Court exerted a great deal of effort trying to give the defendant every opportunity to present a defense in spite of his actions.

Paragraph IX—The contemptuous language and actions involved here are set forth in Appendix "D" of the brief [see also R. Tr. 2321-2322]. This transaction is extremely hard to describe. In a colloquy with the Court as to Shibley asking too many recesses, appellant in sneering, yet fawning, language, described to the Court the events that transpired including his going to the bathroom, "relieving himself" and returning. The very nature of the language, expressed in open court, was offensive to good taste. The manner in which it was spoken was doubly so.

Paragraph X—Paragraph X deals with the refusal of appellant to follow the admonitions of the Court that there was no issue in the case as to the truth or falsity of the charges appellant made against the Marine Corps officers and that appellant would not be permitted to argue

that issue; that appellant did repeatedly argue this matter to the jury. These charges are amply documented by an examination of pages 2290, 2300, 2303, 2304 and 2305 of the Reporter's Transcript. There it can be seen that he again and again attempted to put the Marine Corps on trial.

Paragraph XI—This paragraph deals with appellant's charges that the Court overemphasized reading portions of the instructions dealing with guilt of the accused and on the other hand gave no emphasis to instructions dealing with lack of guilt of the accused. See Appendix "E", [also R. Tr. 2471, 2472, 2476] wherein these accusations were made. The fact that the accusations were made merely lends to the general over-all contemptuous attitude of the appellant Shibley toward the Court. Nothing short of a sound-recording could actually show the reviewing court just exactly how the instructions were read. We might infer from the judgment of acquittal on three accounts and the failure of the jury to agree on three counts that the jury at least did not detect any such emphasis.

Paragraph XII—This paragraph deals with the events of November 20, 1953 and specifically points up the type of conduct set forth in paragraphs II and IV of the Certificate with reference to that particular date. [R. Tr. 2514]. In this instance appellant continued to make objections and take exceptions after the Court had ruled.

Paragraph XIII—The events concerned here again occur on November 20, 1953 wherein in the absence of the jury, the Court, cautioned appellant about repetitive statements and the fact that he had pursued the same course of conduct before the Court of Inquiry, appellant then accused the Court of using an angry tone of voice and "look-

ing at me in what appears to be a malevolent and angry way" and then assigning the same as prejudicial error and misconduct [see Appendix "F"; R. Tr. 2544]. There was in fact no angry tone of voice or angry attitude of the Judge, although the Court did point out to appellant that he was using the same tactics with this Court that he used in "ragging" the Court of Inquiry. This was one of a number of times when appellant accused the Court of an angry tone of voice, an angry demeanor, merely because the Court chose to disagree with his manner of conducting the case. Appellant was obviously trying to build a record in case of appeal and was doing so strictly on his gratituous statements as to the conduct of the Court, knowing full well that there would be little opportunity for the Court to refute those statements on the record.

Paragraph XIV—Paragraph XIV deals with the assignment of error by Shibley based upon the fact that the United States Attorney and one of his Assistants chose to sit at the counsel table with the Assistant United States Attorney who had been trying the case. The charge was so frivolous that it was not unnatural that the Court should find it contemptuous of Court. Appellant contended [R. Tr. 2546-2547] that this was to reimpress, and to put pressure on, the jury to find some sort of verdict against the defendant. It completely ignored the fact that through most of the trial not a single Assistant United States Attorney sat at the counsel table for the Government while at nearly all times appellant not only had Attorney Marshall at his side but also maintained an obviously partisan audience on his side of the Court Room including several of his attorney friends.

Further Comment as to Argument I.

The appellant justified his course of action before the Trial Court on the ground that he was simply trying to elicit the evidence and to give himself a fair defense. There is no need for the appellee to belabor this point. It is felt that this Court, after an examination of the record in its entirety, can reach its own conclusions as to whether this was simply a case of a lawyer trying to put on a defense. It must be kept in mind however that the appellant Shibley is not a novice before the courts of law and that while a portion of his conduct might be justified if he were completely uninitiated in the rules of Court, that certainly would not be the case with a man of his experience. The only conclusion must be that his course of conduct was deliberately conceived with the intention of trying to establish a record of reversible error if he should be convicted.

As the Court reads this record and as the Court reads the portion of the record of the Court of Inquiry incorporated in this record it should be very obvious that the proceedings in both Courts were an attempt by appellant to use the Court as a sounding board for propaganda based upon his charges against the Marine Corps. From the outset the trial of appellant was secondary to appellant's trial of the Marine Corps. If this were not the case why should a simple misdemeanor trial be dragged out for nearly five weeks with the emphasis at every stage being an attack upon the Marines? To emphasize this point, all the Court need do is look at the appellant's opening brief beginning on page 21 and see how here again this Court is being used to further exploit appellant's charges against the Marine Corps. Approximately seven pages

of appellant's brief is devoted to this subject despite the fact that it is not an issue on this appeal any more than it was an issue in the trial below and despite the fact that Judge Yankwich had, in a very learned opinion, reviewed these charges as to the alleged illegal constitution of the Court of Inquiry, and the procedures used, and found them legally correct and proper.

In this same vein appellant contends that his conduct before the "Court of Inquiry" was never in question. As far as the proceeding being void of physical violence, or physical disturbance, he is correct. However, a reading of the portions of the Court of Inquiry record available here (as cited above) shows a studied contempt of the Court of Inquiry in a patronizing and fawning guise of courtesy. The record of those proceedings, however, speaks for itself and needs no comment.

It must be remembered that this was an extremely awkward situation for any Court to handle. Shibley acted in the dual status of defendant and his own counsel. In addition he had an attorney to assist him. The tactics used were obvious. The attorney, Marshall, carried the various elements of the trial as far as he could without running into contempt of Court and then turned the matter over to appellant in fields where it was obvious their tactics were going to violate the rulings of the Court. As defendant, Shibley expected to, and did, violate many of the rules of conduct as a lawyer with relative impunity until the climax came on the 20th of November. On that day, while the Jury was already in deliberation of the case, appellant and Marshall levied upon the Court a barrage of accusations of misconduct, many of which were never cited by the Court in the Certificate of Contempt but which are very obvious in the reading of the record of Novem-

ber 20th, for no apparent purpose. The jury was already out, the instructions were closed except upon request from the jury, and there was no excuse for these tactics except an attempt to provoke an outburst from the Court which might be used as an excuse for a mis-trial or reversal, even though the actions did not occur in the presence of the jury. Still, the Court maintained remarkable restraint until after the jury had returned its verdict. Only then did the Court "let off a little steam." Thus it was not until the trial was over did the Court openly express his feeling that appellant had been contemptuous of the Court and, nowhere in the record before the trial was concluded, can it be shown that any of the rulings of the Court were in any measure influenced by the fact that he felt that his Court was being trifled with.

Some point is made by the appellant of the fact that the Court, in the early stages of the proceedings, made statements which indicated that he was not entirely sure that in every instance he would follow the ruling of Judge Yankwich and that for that reason the Court below left the door open to further argument on these points. While there might be some basis for these arguments based upon the first day or two of the trial, the record clearly shows, as pointed out by Appendix "A" that thereafter the Court firmed up his rulings and, made his position clear on certain basic points. It was on these same basic points that Shibley later made repetitious objections despite unequivocal admonitions by the Court that he had now firmly ruled upon the points in question and would not permit further discussion. It is true that there were some less definite questions, such as whether the attorney-client relationship, and the claim of privilege thereon, was a question of fact or strictly one of law. As to this point

the Court had some difficulty in making up his mind until the closing stages of the case. It was not on this matter, however, that the contemptuous conduct of appellant arose. It should, therefore, not serve as an excuse for constantly pursuing subjects that were definitely foreclosed by the Court.

POINT II.

It Is Appellee's Position That the Court Had the Power and Jurisdiction to Summarily Punish Appellant for Contempt and That There Was No Deprivation of Liberty Without Due Process of Law.

A. The District Court Judge Had the Power to Summarily Dispose of the Criminal Contempt Committed by the Appellant.

The character of the contempt will determine the nature of the contempt proceeding. If a trial judge can certify that he saw and heard the conduct committed in the actual presence of the court, then he can summarily dispose of the criminal contempt. *Federal Rules of Criminal Procedure,* Rule 42(a), 18 U. S. C. A. 401. As stated in *Sacher v. United States,* 343 U. S. 1 (the contempt appeal arising out of Judge Medina's famous trial), at page 9, "The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence." See also *Ex parte Terry,* 128 U. S. 289.

In the instant case, the trial judge certified that he saw and heard the conduct committed in his actual presence [C. Tr. 670-685]. A summary disposition of the criminal contempt followed [R. Tr. 2599].

B. The Power of Jurisdiction of the District Court Was Not Lost or Surrendered by Delay on the Part of the Court in Exercising Its Power to Proceed Without Notice and Proof.

It is contended by the appellant that the Court lost its jurisdiction to punish the appellant for summary contempt because the Certificate of Contempt was not filed by the Court for nearly two months after the conclusion of the trial. The implication is that the Court must make his Certificate of Contempt immediately upon the conclusion of the trial, at the very latest. We find no authority for this precise point. Quite to the contrary we have the language of *Sacher v. United States* (*supra*).

The *Sacher* case merits extra consideration at this point because of the remarkable similarity between the antics of counsel there and here. In this regard, note the following from page 5 (343 U. S. 1) of that opinion:

> ". . . It is relevant to the question of law to observe the behavior punished as a result of the Court of Appeals' judgment has these characteristics: It took place in the immediate presence of the trial judge; it consisted of breaches of decorum and disobedience in the presence of the jury of his orders and rulings upon the trial; the conduct was professional in that it was that of lawyers, or of a layman acting as his own lawyer. In addition, conviction is not based on an isolated instance of hasty contumacious speech or behavior, but upon a course of conduct long continued in the face of warnings that it was regarded by the court as contemptuous. The nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial."

This is practically the exact situation which took place before Judge Carter in the court below. Furthermore, Judge Medina deferred his action on summary contempt until the conclusion of his principal trial. The appellant thereafter made the objection that the Trial Court had lost jurisdiction by not passing judgment at the time the alleged contempts occurred. The question was taken to the Supreme Court and there it was held that the delay was reasonable and that the Court retained jurisdiction. At page 9 of the *Sacher* opinion we find the following:

> "The Rule in question contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial, so it gives him power to do so summarily. But the petitioners here contend that the Rule not only permits but requires its instant exercise, so that once the emergency has been survived punishment may no longer be summary but can only be administered by the alternative method allowed by Rule 42(b). We think 'summary' as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence."

While the Supreme Court did not rule on the precise question as to how many minutes, hours, or days after

the conclusion of trial the hearing on summary contempt must be held, the general language of that Court, and common sense, dictate that a reasonable delay does not constitute error. In support of this view, we find further language in the *Sacher* case (p. 11):

> "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of contempt, immediately and summarily to punish it, if in his opinion, delay will prejudice the trial. *We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power.*" (Emphasis added.)

The trial judge never lost or surrendered the power to summarily dispose of the contempt charge, because he never lost jurisdiction over the person of the appellant. When the appellant committed the misbehavior in the presence of the court he committed the crime of contempt. This action instantly caused jurisdiction to attach.

This jurisdiction was not lost or surrendered by delay on the part of the Court in exercising its power to proceed without notice and proof. *Sacher v. United States* (*supra*). This is especially true when the delay was caused by practical reasons not legally prejudicing the appellant. As stated in *MacInnis v. United States* (C. A. 9), 191 F. 2d 157, at 160:

> "We are in agreement with the conclusion reached in the Sacher case that '* * * immediate penal vindication of the dignity of the court * * *,' as used in Cooke v. United States, 1925, 267 U. S. 517, 536, 45 S. Ct. 390, 69 L. Ed. 767, means as speedy vindication as is practicable in the circumstances, * * *"

There were several specific instances pointed out in the appendices to this brief where the Court actually indicated to the appellant (before the close of the trial and out of the presence of the jury), that appellant's actions were contemptuous [R. Tr. 2316-2317, 2445, 2544]. The Court thus gave advance warning, before the close of the trial, that certain conduct of appellant was deemed to be contemptous. When the trial concluded, late on a Friday afternoon (November 20th), the Court obviously was not in a position to immediately prepare a Certificate of Contempt. There had been no daily transcript of proceedings and none of the record had been prepared by the reporter up to that time except a very small portion which was prepared for reading to the jury. When the Court took up the matter of summary contempt on the following Monday, he continued the matter to November 30th, because "I (the Court) have no part of this record except the portion which Mr. Marshall requested written up. No part except that has been written up, and I want to look at certain parts of the record, which I want written up * * *" [R. Tr. 2566]. Upon advice from the court reporter, the Court decided, "Instead of November 30th I will continue the matter of summary contempt to Monday, December 7th, at 10:00 o'clock, in this court" [R. Tr. 2575].

When Monday, December 7, 1953, arrived, the Court informed the parties that "the reporter has not yet completed preparing certain parts of the transcript. I will continue the matter to Monday, December 28th, 10:00 o'clock, in this court" [R. Tr. 2580]. On Monday, December 28th, the Court was told that appellant was ill and could not make an appearance. The Court then continued the matter until January 18th [R. Tr. 2585]. On that

date, the certificate for summary contempt was filed and the appellant sentenced.

The facts related show that the Court had good reason to delay the judgment on the matter of summary contempt and that the delay in no way prejudiced the appellant. In most of the cited cases, the contemptous actions were isolated or the Court had the benefit of a daily transcript. As a result, he could act promptly at the close of the trial. Where the record is extensive, as here, and is full of citable acts, and there is no daily transcript, common sense dictates that some delay will be necessary. Certainly the desire to be accurate should not divest the Court of jurisdiction, and certainly appellant may not be heard to complain as to that portion of the delay caused by his illness. All in all the Court's action below must be considered acceptable because it brought about as speedy a vindication of the Court's degnity as was practicable under the circumstances.

The last argument under Point II of Appellant's Opening Brief is a sequel to the first and merely implies that if the power to adjudge summary contempt was exhausted, the lower court then should have turned the matter over to another Court to try the question of contempt. This on its face is entirely impractical. In the first place summary contempt is meant to deal with those situations which occur in the presence of the Trial Court where the Court not only hears the spoken word but can observe the manner of speaking, the general demeanor, and the by-plays that take place in the court room. *Sacher v. United States, supra.* None of these intangibles would be available in the record which would go before another court. Without a sound motion picture of what took place in the original court room, another court could not acquire the whole

picture even if it were to call every witness in the court room to give his or her individual version of what took place. They, not being lawyers in all probability, could hardly appreciate the significance of that which they witnessed. This appears to be the fallacy of appellant's whole argument on this point and points out that only in an extreme case of open participation of a Court in a quarrel with the accused should the matter of contempt be turned over to another Court.

The trial of this contempt by another Court would just serve to compound the series of contempts starting in the Court of Inquiry, and carried through into the Court below.

Obviously a trial court must have some authority to protect and preserve the dignity of its own court room. The law has so provided in 18 U. S. C., Section 401, where a Court is given the power to punish for summary contempt when there has been misbehavior of any person in his presence. This is as simple an application of that statute as one could find. The attempts to cloud the issues and to provide an exception to this rule by charging the Court with prejudice and personal animosity is not justified by the record. In fact it is interesting to note the by-play found in the proceedings prior to trial [Vol. A, C. Tr. 185-211] where appellant's counsel literally forced the case out of Judge Yankwich's hands for trial (the Judge who had already ruled on the law of the case on Motion) by insisting on an early trial date that that Judge could not handle because of his recent illness. Thereafter [Vol. A, pp. 207, 208, 211] a desire was expressed by both appellant and his counsel to have Judge Carter try the case rather than have it go to another judge.

C. The Judgment Upon the Misconduct of Appellant Was Not Entangled With Any Personal Feelings of the Judge Against the Appellant.

Again the case of *Offutt v. United States,* 348 U. S. 11, is cited to support the proposition that the appellant here was deprived of his liberty without due process of law. It is submitted that no such construction can be made of the *Offutt* case in light of the distinction of facts between the *Offutt* case and those here.

It is contended by the appellant the Court lost its jurisdiction to punish the appellant for summary contempt because the Certificate of Contempt was not filed by the Court for nearly two months after the conclusion of the trial. The implication is that the Court must make his Certificate of Contempt immediately upon the conclusion of the trial, at the very latest. We find no authority for this precise point. In this particular case the delay was quite understandable. In the first place there were several specific instances pointed out in the appendices to this brief where the Court actually indicated to the defendant-appellant (before the close of the trial and out of the presence of the Jury) that Shibley's actions were contemptuous [C. Tr. 2316-2317, 2445]. The Court thus gave advance warning, before the close of the trial, that certain conduct of Shibley was deemed to be contemptuous. When the trial concluded, late on a Friday afternoon, the Court obviously was not in a position to immediately prepare a Certificate of Contempt. There had been no daily record of the transcript of proceedings and none of the record had been prepared by the reporter up to that time except a very small portion which was prepared for reading to the Jury. In the ensuing days from November 20th to December 28th the Court, after

apparently indicating to the reporter those portions of the record which he wanted to review, waited for the reporter to write up those particular portions so that he would be in a position to document his Certificate of Contempt. Certainly the desire to be accurate should not divest the Court of jurisdiction. The last twenty days of the delay was brought about by Shipley's own request for continuance on the ground of illness and it was for that reason that the Certificate of Contempt was not filed until January 18th instead of December 28th. Certainly Shibley should not be heard to complain of this latter delay.

Next, there is the proposition that the judgment upon the alleged misconduct of counsel was "entangled with the Judge's personal feelings against the lawyer" such as was the situation in *Offutt v. United States* (*supra*). While the *Offutt* case enunciates such a principle, the facts of the *Offutt* case were entirely different. In the *Offutt* case it was quite apparent that the Court not only became violently angry with counsel during the course of the trial but lost his temper, shouted at counsel, and obviously completely lost control of his conduct of the case. It was possibly with this in mind that Shibley on several occasions accused the Judge in the Court below of appearing to shout at him. There was no shouting and no angry demeanor by Judge Carter below although there is nothing in this record, other than the Court's own denial to refute Shibley's accusation which he contributed to the record. Again appellee can only ask that the Court read the entire record and see whether the record indicates the conduct of Judge Carter was at any time ill tempered or prejudiced. It is sincerely felt that such was not the case.

Conclusion.

The entire record, appellee believes, will show that the Court below acted with the utmost dignity and tried at every stage of the proceedings to maintain order despite the attempts of the appellant to impede the progress of the trial. The record shows a studied contempt of the Court in a deliberate attempt, which the Court recognized and attempted to forestall, by the appellant to turn the case into a trial of the United States Marine Corps. Much of the appellant's disobedience of the orders of the Court stem from these particular tactics. The tactics were deliberate and well conceived. The appellant's seventeen years of law practice indicate that his actions were not those of a novice before the bar. At all stages of the proceedings he was advised by clever and capable counsel.

The case was an extremely simple one for the jury although at times difficult for the Court and counsel. Appellant's brief at page 19 appears to indicate that the Court could not decide whether the case was simple or difficult. The distinction however is clear. The case was very simple as to the jury as they merely had to determine whether the certain questions asked were answered and whether or not a subpoena had been served and witness fees paid. In that sense the Court was correct in telling the jury that this was a very simple case. On the other hand the Court was also quite accurate in explaining to the jury [R. Tr. 1119] that there were complex legal principles involved. Those complexities however were for the Court and counsel to resolve and did not involve the

jury. The legal issues had been largely resolved by Judge Yankwich and were constantly being dragged back into the case despite the admonitions of the Trial Court.

The delays in filing the Certificate of Contempt would appear to be very normal under the circumstances. Appellant has offered no case authority to show that under these circumstances the delays would divest the Court of jurisdiction. It is true that in many of the cases where written opinions on the subject are available some Certificates of Contempt were made immediately at the close of the trial. An examination of those cases however reveals that either the point was simple and could be immediately pin-pointed in the record or daily transcripts were available which would permit the court to mark the appropriate places in the transcript as the trial progressed. That was obviously impossible here in the absence of a daily transcript.

It is respectfully submitted that there is no showing whatever of personal bias or prejudice or animosity by the Trial Court below. In the absence of such a showing this Court should accept the findings of the Court below who had the opportunity to observe all of the circumstances surrounding the spoken word and to appreciate the entire atmosphere of the contempt. This Court, being aware of the naturally calm and judicious demeanor of the particular judge involved in the Court below, should take cognizance of that fact in interpreting the written record.

It is respectfully submitted therefore that the judgment of the Court below should be affirmed.

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APPENDIX A.

Instances of Repetitious Objections and Harassing Motions.

[References are to pages of Reporter's Transcript on appeal.]

VOLUME I.

5 ..... (Jury absent)

Defendant moves to dismiss the Information on the ground that the Information, as amplified by the Bill of Particulars, fails to charge an offense.

8-26 ..... (Jury absent)

Grounds are stated by appellant for Motion to Dismiss.

27 ..... (Jury absent)

Court holds Judge Yankwich's decision persuasive, but not binding. Additional grounds for dismissal are raised [through p. 30]. Motion for leave to develop these grounds by argument is denied.

33 ..... (Jury absent)

Motions for dismissal are denied without prejudice.

34 .....(Jury absent)

Court suggests that all other extensive motions should be in writing. (Brief discussion *re* 114 questions presented by Shibley to the Court for *voire dire* examination of jurors.)

118 ..... (Jury absent)

Appellant complains about the contents of the Trial Memorandum.

150 ..... (Jury present)

Court admonishes the Appellant:

> "We are not going to try the Bennette case in this court. You may allude briefly to that case for the

purpose of background, but we are not going to try the Bennette case in this court."

151 ..... (Jury present)

Prosecution objects to further statements by appellant involving the Bennette case.

152 ..... (Jury present)

Court admonishes appellant again as follows:

"We are not going to try your charges made in your letter, either, Mr. Shibley. The issues before this jury will be: was there a Court of Inquiry called that had jurisdiction? Were you subpoenaed to appear before that court? Were you asked certain questions, which you refused to answer, and were you ordered or directed to answer the questions, and did you do so unlawfully? Therefore, we are not concerned with whether the statements you made were true or false, generally speaking, nor are we concerned with whether you can prove them, because we are not trying General Megee or Colonel Endweiss in this case."

157 ..... (Jury present)

Court admonishes appellant again that he will not go into the question of truth or falsity of Shibley's charges against General Megee or others and that the court would not retry the Bennette case.

158 ..... (Jury present)

Court again admonishes appellant that this action was not concerned with what happened to Bennette.

163 ..... (Jury present)

Court admonishes appellant again on references to the Bennette court martial and to certain other activities collateral to the Court of Inquiry.

Volume II.

181-183 ..... (Jury absent)

Court again outlines argument which he will permit and holds that Rule of Comity will apply as between himself and earlier opinion by Judge Yankwich.

185-190 ..... (Jury absent)

Court outlines what he considers question of law and what he considers questions of fact in this case.

200 ..... (Jury absent)

Court again states that he will follow Judge Yankwich's rulings.

206 ..... (Jury absent)

Court permits further argument on matters not heretofore heard before Judge Yankwich and outlines what points he will consider.

208-226 ..... (Jury absent)

Argument by appellant permitted by the Court. At page 226 Court terminates the argument.

227 ..... (Jury absent)

Court admonishes appellant on repetitious motions presented after court ready for trial and jury impaneled.

228 ..... (Jury absent)

Court refers to appellant's conduct as unlawyerlike.

Volume III.

332 ..... (Jury absent)

Court refers to obstructionist tactics of Shibley in requiring original Marine Corps record from Washington to be marked for identification and held by the Court when photostatic copies were available.

Volume V.

557 ..... (Jury absent)

Court points out that defendant had taken 2 days in cross-examining a witness who was strictly a "form witness" brought to introduce a document into evidence and who had not testified to any of the matters that were the heart of the information. Court further admonished that under the guise of examination of bias and prejudice, he would not permit counsel to go into the Bennette case and retry the court martial proceedings. (While this admonition was directed to Attorney Marshall, Marshall had just shortly before relieved Shibley on the examination of this witness and had followed the same line of inquiry.)

615 ..... (Jury present)

Court again admonishes Shibley ". . . I am not reviewing what this Court of Inquiry did."

Volume VI.

732 ..... (Jury absent)

Court comments on fact that after half a day of testimony, mostly cross-examination by Shibley (devoted to minute details of the manner in which Sergeant Johnston made the dictaphone recording of the Court of Inquiry proceeding) that Shibley was building up such a lengthy record on irrelevant points that if he should be convicted the costs might be prohibitive.

753 ..... (Jury present)

Court admonishes appellant on repeated use of immaterial and irrelevant questions dealing with manner of transcription and preparation of Court of Inquiry record. (Continues 3 following pages.)

805 ..... (Jury absent)

Court admonishes Shibley at length *re* delaying tactics and general conduct of the case.

VOLUME VIII.

993 ..... (Jury present)

Court reads to jury questions asked Shibley by Court of Inquiry and his replies.

1043 ..... (Jury absent)

"The Court: Mr. Shibley, I have read that transcript and I marvel at the patience of the Court of Inquiry.

This is outside the presence of the jury.

If anybody ever ragged a court of inquiry or any other court, you ragged that court. You were told you could state your privilege. You would then repeat all the privileges that you had claimed heretofore, you would then restate some that you had claimed, and then you would say, 'May I state further privileges?' and the court would say, 'Yes, you may state further privileges.' And then you would proceed to state something that was not a privilege, maybe in the nature of an objective or argument, and then proceed to restate statements you had made before and already incorporated by reference. And then you would wind up again with, 'May I state further privileges?'

Speaking very frankly to you, you know and I know that you wouldn't have done that in the United States District Court. You know that you wouldn't have done that. And I don't know what you would have done in the Superior Court. But you wouldn't have done it in the District Court.

Now, Congress has seen fit to authorize Courts of Inquiry. Congress must know that the officers of these

courts are not all lawyers. Congress has adopted regulations to assist them. I can't but escape the impression, the conclusion that you worked very diligently to get yourself into some kind of a position where you would be in trouble with some organization. I never saw a fellow work so hard to get himself in trouble with a court of inquiry, or with any court, as you did at El Toro."

VOLUME IX.

1083 (at the bench) offers of proof on testimony of Zula Bennette.

1100 ..... (In chambers)

Shibley accuses the Court as follows:

"Mr. Shibley: I would like to make it. But before I make it, I wish to make an assignment of your Honor's remarks, both after court reconvened and your Honor made reference to what you told us at the bench, and your Honor's comments with respect thereto, and also your Honor's telling the jury after we left the bench before the recess as to what had been done at the bench.

As I understood it, the purpose of going to the bench was so that these matters and none of the matters would be in the presence of the jury.

The Court: There was in the presence of the jury the reference to the fact that an offer of proof was to be made.

Mr. Shibley: And may I assign your Honor's remarks last made in court, right before we came in here, as having been made in what appeared to be an angry, disapproving tone, and glances toward me, the defendant, and I do, respectfully, suggest to your Honor that that is prejudicial to the defendant.

The Court: I disclaim any angry, disapproving tone. And I have tried to be very patient, but, Mr.

Shibley, you and Mr. Marshall knew what proof you were going to offer. You, surely, after Mrs. Bennette was called, and my suggesting to you at the bench that the calling of Master Sergeant Bennette would probably be subject to the same objection and raise the same problem, you could well have made your offer of proof before the jury were brought in."

1099-1119 ..... (Jury absent)

Offer of proof on Master Sergeant Bennette.

1121-1150 ..... (Jury absent)

Offers of proof as to testimony of Robert W. Kenny.

1153 ..... (Jury absent)

Offers of proof as to Captain Arnold G. Hewett.

1162-1164 ..... (Jury absent)

Court warns Shibley that he had competent counsel and that he was harming himself in his conduct of the case; Court cites rambling offers of proof made on pages 1153-1162.

1166 ..... (Jury absent)

More offers of proof as to Captain Hewett.

1170 ..... (Jury absent)

Court warns Shibley to shorten up offers of proof.

1170-1178 ..... (Jury absent)

Eight more pages of offers of proof.

1181 ..... (Jury absent)

Court remarks "We are not going to spend forever on these offers of Proof."

1182, 1183, 1184 ..... (Jury absent)

Court comments (after 4:10 P. M.) that defense had been on since 10 A. M. and had not yet put a single

matter before the jury—that all that time had been taken up in rambling offers of proof.

VOLUME XIII.

1686 ..... (Jury present)

Court admonishes Shibley in effect to follow rules of cross-examination, that trial must move faster. Shibley assigns comment of Court as error.

1689 ..... (Jury absent)

Court suggests Shibley is stalling for time and that he should permit his attorney, Mr. Marshall, to act for him.

1691 ..... (Jury absent)

Shibley accuses the Court of a "series of looks, grimaces, expressions, verbal and facial, which have gone on for several days in the presence of the jury, when I was a witness, when I tried to ask a certain question, which can only have the effect, your Honor, of making the jury believe that I am some sort of a shyster, or there is something unethical about what we are doing * * *"

VOLUME XIV.

1810 ..... (Jury absent)

Shibley accuses Court of "general attitude of ingratiation toward the prosecution, of undue deference of assistance to the officers, and the brass from the Marine Corps, to your Honor's unequal treatment of the defense witnesses, and unequal treatment * * *"

1817 ..... (Jury absent)

Shibley assigns as error the fact that Court makes him make offers of proof. Court points out his reason for requiring offers of proof.

1821 ..... (Jury absent)
Shibley makes speech vilifying the Marine Corps.

1822 ..... (Jury absent)
Court comments on the speech and the fact that there appeared to be a reporter present taking down Shibley's remarks.

VOLUME XV.

2053-2056 ..... (Jury absent)
Colloquy *re* late instructions by Shibley.

VOLUME XVI.

2134 ..... (Jury absent)
Court objects to Shibley's lengthy objections to form instructions.

VOLUME XVII.

2290, 2300, 2303, 2304, 2305 ..... (Jury present)
In course of Shibley's argument to the jury Court admonishes Shibley for going beyond the evidence.

2316-2317 ..... (Jury absent)
Court refers to Shibley as contemptuous of court.

VOLUME XVIII.

2387 ..... (Jury present)
Court calls down Shibley for trying to give evidence before the jury during the course of the prosecution's arguments to the jury.

VOLUME XIX.

2544 ..... (Jury absent)
Court admonishes Shibley on repeated objections.

2547, 2548 ..... (Jury absent)
Court again admonishes Shibley on repeated objections.

APPENDIX B.

Events Involved in Paragraph VI of Certificate of Contempt.

VOLUME XIV.

1809-1811 ..... (Jury absent)

"Mr. Shibley: Now, your Honor, I would appreciate your Honor letting me state my case.

I must assign, your Honor, as misconduct your Honor's constant aid of the prosecution. Something came to my attention that I do wish to make a record of.

The Court: Mr. Shibley, proceed.

Mr. Shibley: At this time, it having come to my attention last night, having been told by my client, I do wish to assign as misconduct and evidence of prejudice in this case what I am informed took place the other day in the discussion of instructions.

I am informed that your Honor came out here, called Mr. Marshall and Mr. Deutz, and invited these witnesses, these officer witnesses from the Marine Corps, who are really adverse to the defendant, in, saying, 'Well, you are lawyers, come in.'

The Court: It is an open session of court held in chambers.

Mr. Shibley: I wish to conclude my assignment, your Honor. That your Honor—that my client Master Sergeant Bennette was standing around, and that he certainly has a definite interest in my fate, since if I lose he may expect to be racked, to use Marine Corps language, and

that your Honor made no extension of any courtesy or invitation to him, or to my secretary, who has been keeping notes for us. And I do wish to assign that, your Honor, along with your Honor's general attitude of ingratiation toward the prosecution, of undue deference and assistance to the officers, and the brass from the Marine Corps, to your Honor's unequal treatment of the defense witnesses, and unequal treatment—

The Court: Mr. Shibley, I consider you being contemptuous of this court. Proceed with any offer of proof that you want to make.

When a jury is here, and you are representing yourself as a lawyer, as it were, for yourself, then this court is under a handicap, because you don't have to comply with the rules that lawyer would have to comply with, because you are the defendant. But there is no jury here present now.

Now, I take it these matters that you have been going on at length about, some of them may be matters which you can have a right to make a record on, and some not. Now, you will confine—you are a lawyer—out of the presence of the jury, you will confine yourself to those remarks that are lawyerlike objections, and refrain from matters that aren't lawyerlike.

Mr. Shibley: May I ask if it is your Honor's direction that I am not permitted to assign these things?

The Court: You may asign such matters that you contend are misconduct that you think are proper, and which are made in a lawyerlike manner.

Proceed.

Mr. Shibley: May I just say, your Honor, that I contend that these matters are matters to which I may make an assignment.

The Court: All right. No. 1. Certainly, the settlement of instructions in a case, which are held in an open hearing, although it is held in chambers, it is not some thing that you can complain about. And there was no record made. Mr. Marshall was present. There was no request that your secretary be admitted. She would have been admitted if she had asked. The fact that we held them in chambers was no different than holding them here in the court room, except we were all a little more at ease. And there was no record then made by Mr. Marshall, nor was request made for the presence of any other persons. And it therefore cannot now be made by you as an assignment of error. So I won't hear you any further on that."

APPENDIX C.

Accusation of Prejudice on Part of Judge.

VOLUME XVII.

2320 ..... (Jury absent)

"Mr. Shibley: Your Honor, I assign your Honor's remarks to me as being serious judicial misconduct and indicating a serious bias and prejudice against me, and a serious bias and prejudice in helping Mr. Deutz. And at this time I also wish to assign as misconduct something which was just brought to my attention today that you apparently said on the record when I wasn't listening: that Mr. Deutz was appointed by you to the U. S. Attorney's office when you were the United States Attorney. And I assign your Honor's constant interference with the defense, in aid of the prosecution, and constant failure to protect the defendant in this case from the sort of things that were said here, as being serious misconduct, and at this time we ask that that be noted and ask that a juror be withdrawn."

APPENDIX D.

Events Set Forth in Paragraph 9 of Certificate of Contempt.

VOLUME XVII.

2321 ..... (Jury absent)

"Mr. Shibley: Before the jury comes down, your Honor, I would appreciate a five-minute recess.

The Court: You just had a recess.

Mr. Shibley: It wasn't a recess, as far as I was concerned, your Honor. This matter does involve me, and—it isn't unnatural—

The Court: How often do we have to have a recess?

Mr. Shibley: Five minutes would be adequate.

The Court: We gave you a recess at approximately ten minutes to three. It is now ten minutes after three. Do you want a recess every twenty minutes?

Mr. Shibley: Your Honor, I did not have a recess. I happened to run out of the court room in the bathroom. Should I keep describing what I did? I relieved myself, I turned around and came back. I don't think I was out of this room for more than two minutes and thirty seconds, and it was not what I call a recess.

The Court: We will take a short recess. How long do you want, Mr. Shibley?

Mr. Shibley: Five minutes, your Honor.

The Court: All right. I will give you seven."

APPENDIX E.

Accusation That Court Gave Unfavorable Emphasis in Reading Instructions.

VOLUME XVII.

2471-2472 ..... (Jury absent)

"Mr. Shibley: We want to add the additional objection to Court's Instruction No. 12 as given, that the form of the instruction and the juxtaposition of what the jury, if anything, should do, unduly stresses guilt and would tend to mislead the jury to believe that the court was indicating a finding as against the defendant with respect to that issue.

The Court: Your objection is overruled.

Mr. Shibley: With reference to Court's Instruction No. 21 as read, in addition to the other objections we have incorporated, we object on the grounds that this instruction as read appeared to stress the guilt of the defendant, alleged guilt of the defendant, or seemed to indicate a suggestion that the defendant be found guilty. The same objection, your Honor, is made as to Court's Instruction No. 11.

The Court: All right. The objection is overruled.

Mr. Shibley: And especially in the case of Court's Instruction No. 11 it appeared to me, your Honor, that your Honor seemed to stress by your tone of voice and by the loudness of your voice—I have no objective way of knowing that that was so—those items that had to do with findings against the defendant, and we have added, and your Honor has overruled, I take it, the objection that that as read is unduly repetitive and reiterates, especially in the latter part or the latter two-thirds

or three-quarters of the instruction and emphasizes findings in favor of the Government on the issues.

The Court: The objection is overruled. The record will show that I tried to read all the instructions clearly and loud enough for the jury to hear, and tried to equally emphasize alternatives where there were alternatives that the jury were presented with.

Proceed.

Mr. Shibley: The same objection as to the manner of reading which I urged with reference to the previous instruction we now add to the previous objections made to Court's Instruction No. 15."

2476 ..... (Jury absent)

"Mr. Shibley: Here it is. It is Form Criminal 19, which I believe was given among the last four or five of your Honor's instructions as you gave them, and as I heard you, your Honor, it seemed that when you came to line 9 where the instruction says, 'if the accused be proved guilty, say so,' that you said that in a very loud, determined tone, which I wrote down in my notes at the time, 'Fairly shouted,' although it is probably an exaggeration.

I did not notice similar emphasis or loudness, your Honor, as to the next sentence, 'If not proved guilty, say so.'

The Court: Mr. Shibley, the record will show that I tried to state those two sentences with equal emphasis. Your exception is overruled on that ground."

APPENDIX F.

Events Set Forth in Paragraph 13 of Certificate of Contempt.

VOLUME XIX.

2544 ..... (Jury absent)

"The Court: Just a moment. Mr. Shibley's objections and requests are denied. And you have had about three or four of them, and that is all, Mr. Shibley.

Before the Court of Inquiry, after taking up minutes of time and repeating statements of privilege, you would always end up and say, 'May I state further privileges,' and then it would go on again for a long time, and then you would wind up, the court would rule, and then you would say, 'May I state further privileges?' Now you have had about three or four bites at the apple. That is it.

Mr. Shibley: I object to your Honor's manner of speaking to me at this time, in an angry tone of voice, looking at me in what appears to be a malevolent and angry way, and I assign it as prejudicial error and misconduct.

The Court: I consider you contemptuous of this court, and we will take that matter up later."

APPENDIX G.

Specific Instances Where Court Devoted Time and Effort to Assist Appellant—as Contrasted to Allegations of the Appellant That Court was Biased and Prejudiced Against Him.

VOLUME IV.

464 *et seq.* ..... (Jury present)

Court permitted Shibley to open up hours of testimony on Shibley's claim that dictaphone recordings had been tampered with by the Marines although testimony did not point out anything definitely shown to be missing and even Shibley's claims of alleged missing matter was vague and indefinite.

495-550 ..... (Jury present)

Court permitted Shibley, in the guise of showing bias and prejudice, to drag into the record most of the findings and conclusions of the Court of Inquiry admitted by the Court not to be otherwise material.

VOLUME V.

550 ..... (Jury present)

The Court had permitted [541] Attorney Marshall to take over from Shibley in the middle of the cross-examination of a witness. Then Marshall follows the same line on inadmissible testimony and the Court warns of near deliberate misconduct [550].

VOLUME VI.

731 ..... (Jury absent)

The Court warned Shibley of the tremendous cost he was running up for a transcript of the record if he was forced to take an appeal and that the material he was covering was all irrelevant to the proceedings.

806 ..... (Jury absent)

The Court again warned Shibley that he was doing himself a great disservice by his tacatics in handling his case before the jury.

VOLUME VII.

932-936 ..... (Jury absent)

Colloquy with counsel indicates the attempt of the Court to eliminate any prejudicial material in the Court of Inquiry record as to Shibley and the Court remarks that he wants to "be doubly sure you got a fair trial—"

VOLUME IX.

1162-1164 ..... (Jury absent)

Court again warned Shibley that he had competent counsel and that he was harming himself in his conduct of the case instead of permitting counsel to act for him.

VOLUME XI.

* * * ..... (Jury present)

Shibley gets the Court to read a large portion of irrelevant Court of Inquiry record by the claim of trivial omission from the transcript. An examination of this section of the record will show that the Court in his efforts to lean over backward to give Shibley a fair trial permitted Shibley to use this ruse to drag into the record numerous statements made by Shibley at the Court of Inquiry dealing with the Bennett case and other matters completely unrelated to the charges for which he was held to answer before the District Court.

1423-1429 ..... (Jury absent)

In the same vein as above, Court permits Shibley to bring in the fact of his arrest by Marine Corps personnel

though this was not an issue in the case and despite the protest of the prosecution that permitting evidence of this type was allowing Shibley to put the Marine Corps on trial whereas he was the defendant. Court later permitted testimony along this line to be introduced before the Jury.

NOTE: It should be noted that when the Jury was out for deliberation and additional instructions were requested, the Court leaned over backward in favor of the defense by reading many instructions not directly asked for by the Jury but insisted upon by the defendant. These instructions, which were read and reread, were those emphasizing that any substantial answer to the questions asked by the Court of Inquiry would negate guilt of the defendant in refusing to answer the question. The overemphasis of these instructions was actually prejudicial to the prosecution.

No. 14465.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. SHIBLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 14465.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE E. SHIBLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTION.

The United States District Court had jurisdiction of this case by virtue of Title 18, U. S. C., Section 3231; Title 18, U. S. C., Sections 7, 13.

Appellant and Charles Raymond Thompson were indicted on June 25, 1953 for four offenses summarized as follows [C. Tr. 2-6]:[1]

COUNT ONE: Violation of Title 18, U. S. C., Sections 7, 13, and California Penal Code, Sections 459, 460,

---

[1]Reference to Reporter's Transcript is indicated as "R.Tr.," and to Clerk's Transcript of Record as "C.Tr.," and to Clerk's Supplemental Transcript of Record as "Supp.C.Tr." Pagination and lineation, where indicated, are inclusive.

namely, that Thompson entered a building on lands reserved for the exclusive use of the United States at El Toro Marine Air Station in Orange County, California, in the Central Division of the Southern District of California, with the intent to commit larceny therein. Appellant was charged with aiding and abetting Thompson in the commission of this offense [C. Tr. 2].

Count Two: Violation of Title 18, U. S. C., Section 641, namely, that appellant and Thompson, within the Central Division of the Southern District of California, did steal, purloin, and knowingly convert to their own use property of the United States having a value in excess of $100 [C. Tr. 3].

Count Three: Violation of Title 18, U. S. C., Section 641, namely, that appellant and Thompson, within the Central Division of the Southern District of California, did receive, conceal, and retain with intent to convert to their own use and gain property of the United States which had theretofore been stolen from the United States as said defendant then and there well knew, said property having a value in excess of $100 [C. Tr. 4].

Count Four: Violation of Title 18, U. S. C., Section 371, namely, that appellant and Thompson conspired together to:

(a) Enter a building on lands reserved for the exclusive use of the United States with intent to commit larceny therein, in violation of Title 18, U. S. C., Sections 7 and 13, and Sections 459, 460, California Penal Code.

(b) To steal and purloin and knowingly convert to their own use property of the United States, said property having a value in excess of $100;

(c) To conceal and retain with intent to convert to their own use and gain certain property of the United States which had been stolen from the United States as said defendant then and there well knew, said property having a value in excess of $100 [C. Tr. 5-6].

Defendant Thompson entered a plea of guilty to Counts 1 and 4 prior to trial, and Counts 2 and 3 were dismissed as to him [R. Tr. 3-5].

Count 2 was likewise dismissed as to appellant prior to trial [R. Tr. 5-6].

Appellant was tried on Counts 1, 3 and 4 before a jury with the Honorable Ben Harrison presiding [R. Tr. 3-6]. Jury returned verdict finding appellant guilty on Counts 3 and 4 [C. Tr. 91].

Jury failed to return verdict on Count 1 [C. Tr. 91].

Jury found property involved to have a value less than $100 [C. Tr. 91].

On January 25, 1954, Judge Ben Harrison sentenced appellant on Count 3 to one year, and on Count 4 to three years in the custody of the Attorney General, said periods of imprisonment to begin and run concurrently [C. Tr. 179].

Notice of appeal by appellant was filed January 29, 1954 [C. Tr. 180-181].

The United States Court of Appeals has jurisdiction by virtue of Title 28, U. S. C., Section 1291.

II.
APPELLANT'S SPECIFICATION OF ERRORS.

Respondent will take up the specification of errors and argument set forth in appellant's opening brief in the same order as set forth therein:

1. **The Evidence Was Sufficient to Sustain the Conviction of Appellant. There Was Probative and Substantial Testimony to Support the Verdict and Judgment Below. The District Court Did Not Err in Failing to Grant Appellant's Motion for Judgment of Acquittal.**

Appellant has devoted so much space in his opening brief (45 pages) to minimizing the evidence, to drawing every conceivable unfavorable inference from the evidence, to quoting as evidence a vast amount of material which finds no support in the record except from an affidavit made by appellant himself in support of his preliminary motion to disclose the minutes of the grand jury, and to broadside attacks upon the credibility of appellee's witnesses,—that a brief summary of the evidence relied upon by the government and a brief survey of the fundamentals of appellate review of evidence is deemed appropriate.

Witness Robert Huckenpahler testified that in 1952, he was a Corporal in the Marine Corps, stationed at the El Toro Marine Base [R. Tr. 57]; that he was a clerk-typist court reporter and helped write reports [R. Tr. 77]; that he typed matters that came into the Base legal office [R. Tr. 77]; that during the Bennett court-martial proceedings (Nov. 7-25, 1952) he acted as appellant's escort from the "gate" to the legal office inside the Base where the proceedings were being held [R. Tr. 58, 77]; that during the progress of the Court of Inquiry (Dec.

3-12, 1952) he talked with appellant in the men's room in the court building [R. Tr. 58]; that he told appellant if there was anything he (Huckenpahler) could do to help in regards to the Court of Inquiry, or anything that appellant needed, he would be glad to help him [R. Tr. 59]; that appellant thanked him and said there may be a man contact him by the name of Rusty [R. Tr. 59]; that he gave appellant his name, address, and possibly his telephone number [R. Tr. 59]; that shortly thereafter Rusty called him on the telephone and made an appointment to meet him at a drug store in Newport Beach [R. Tr. 60]; that he (Huckenpahler) met this man who identified himself as Rusty (co-defendant Charles Raymond Thompson) and they went to the Shamrock Bar in Costa Mesa [R. Tr. 64]; that at this meeting Rusty told him that he was working for appellant [R. Tr. 65]; that at this meeting Rusty called appellant on the telephone but received no response [R. Tr. 66]; that at this first meeting Rusty inquired about the transcript of the Court of Inquiry and he (Huckenpahler) told him that it had not been completely transcribed at that time [R. Tr. 66]; that three or four days after this meeting Rusty called on him at Huckenpahler's home [R. Tr. 68] and inquired again about the transcript [R. Tr. 68]; that he told Rusty that it was coming along but had not been completed as yet [R. Tr. 69]; that shortly thereafter he (Huckenpahler) talked to Rusty on the telephone and Rusty again asked how the transcript was coming along [R. Tr. 70]; that he told Rusty that it had not been completed yet [R. Tr. 70]; that on the 11th or 12th of December he (Huckenpahler) met Rusty at the Tally-ho Bar in Long Beach and Rusty again asked him when the transcript would be completed [R. Tr. 72]; that he told Rusty that it would be completed in about one week [R. Tr. 72]; that at this meeting, under

his (Huckenpahler's) instructions, Rusty drew a diagram of the legal office, indicating the exact location where the completed copy of the transcript would be [R. Tr. 72]; that at this meeting he (Huckenpahler) told Rusty how to get into the office and where the key would be kept [R. Tr. 72]; that on December 17, 1952, Rusty came to Huckenphaler's home and asked if the transcript would be in the place that he (Huckenpahler) had indicated it would be at their last meeting [R. Tr. 75]; that he told Rusty it would be in the same spot [R. Tr. 75]; that Rusty had a girl with him by the name of Yvonne [R. Tr. 74]; that Rusty showed him identification cards he was going to use to get aboard the Base [R. Tr. 75].

Witness Charles Rusty Thompson testified that approximately the first of December, appellant asked him to contact Corporal Bob Huckenpahler [R. Tr. 115]; that at that time the appellant gave him a card containing the name, address and telephone number of Huckenpahler [R. Tr. 115]; that he called Huckenpahler on the telephone and agreed to meet him at a drug store in Newport Beach [R. Tr. 116]; that after the meeting at the drug store they drove to the Shamrock Bar in Costa Mesa [R. Tr. 116]; that at this meeting Huckenpahler confirmed that he (Rusty) was the person that appellant said would contact him [R. Tr. 117]; that at this meeting they discussed generalities [R. Tr. 117]; that Huckenpahler said he was working in the legal office at El Toro [R. Tr. 117]; that Huckenpahler said "he would like to help me in any manner that he could, in helping Mr. Shibley, because he didn't think that Mr. Shibley had quite got a fair shake" [R. Tr. 117]; that after this first meeting he (Rusty) gave appellant all the information that Huckenpahler had given him at their first meeting and confirmed

the fact that Huckenpahler would still like to help [R. Tr. 118]; that he (Huckenpahler) was working in the legal office and that there were certain records that he had access to, and that he might be able to obtain copies if it would help appellant's case [R. Tr. 118]; that after talking with appellant and within a week he (Rusty) again contacted Huckenpahler at the latter's home [R. Tr. 118]; that at this meeting they talked about the transcript of the Court of Inquiry [R. Tr. 119]; that he (Rusty) talked with appellant about this every day [R. Tr. 120]; that the Sunday before the 19th of December (night of burglary) he and Huckenpahler met at Tally-ho Bar in Long Beach [R. Tr. 120]; that at this meeting, under the directions of Huckenpahler, he drew a diagram showing the rooms in the legal offices and the place where the finished transcript would be located [R. Tr. 121, 122]; that within two hours after this meeting he (Rusty) talked with appellant about this conversation and told appellant that the transcript would be completed at the end of the week [R. Tr. 124]. At this point the court questioned the witness Thompson as to whether or not he told appellant the details and the witness replied, "I am sure that at one time or another, as I stated before, Mr. Shibley and I talked about this case practically every day and I am sure that upon more than one occasion Mr. Shibley and I discussed the exact locations of these rooms in which these documents were being prepared" [R. Tr. 124]. Witness Charles Rusty Thompson further testified that on the night of the 19th of December (night of burglary), shortly after dark, he saw appellant [R. Tr. 124]; that he told appellant that he had been in touch with Corporal Huckenpahler and that it appeared this would be the last night that the record would be available, and that it appeared as though tonight would be the night

[R. Tr. 125, 126]; that appellant asked if he (Rusty) thought they could be gotten and he told appellant "Yes, it appears as though they can" [R. Tr. 126]; that appellant said "Do you have everything pretty well in mind yourself, as to what you are going to do" [R. Tr. 126], and he replied in the affirmative [R. Tr. 126]; that appellant asked him if he had gloves, to which he replied in the affirmative and then appellant said "Well," something to the effect "Don't forget to wear them," or something like that [R. Tr. 126]; that he (Rusty) then went to Huckenpahler's home [R. Tr. 127]; that he then went aboard the Base, entered the legal office and found the transcript in exactly the place designated on the diagram [R. Tr. 128, 129]; that he removed the transcript from the building [R. Tr. 129]; that the next morning he took the records to appellant's home in Long Beach, California, and delivered them to appellant personally, and he (appellant) looked through the transcript at that time [R. Tr. 189]; that appellant told him (Rusty) to get it photostated [R. Tr. 190]; that he (Rusty) made arrangements that same day with Joe Benjocky, owner of Louise's Photo Studio in Long Beach, to do the photo work [R. Tr. 174]; that he told appellant that the photo work would cost $200 [R. Tr. 191]; that after the photo work was completed he took the original stolen copy, the photographic copy and the negatives, and delivered them to appellant at approximately 9:00 A. M. Sunday morning [R. Tr. 175]; that appellant told him "that he (appellant) could not keep them around the house," and "I want you to do this, I want you to take the negatives and mail them back to me, take the reproduction and mail it to my attorney, Dan Marshall, in Los Angeles, and take the original (stolen copy) and mail it to Drew Pierson" [R. Tr. 178]; that on Monday he (Rusty) obtained the $200 cash for

the photo work from appellant's secretary [R. Tr. 192]; that he, with the assistance of one Patrick Fields, mailed the articles as directed [R. Tr. 193]. Rusty Thompson paid Benjocky the money for photographing job [R. Tr. 383]. The articles were mailed as directed—see testimony of Postal Inspector Hudson [R. Tr. 224].

Reference is hereby made to Government's Exhibits 1, 2, 3, and 4, evidencing jurisdiction of the United States of America over the El Toro Marine Air Station in Orange County, California.

Appellate courts will not weigh the evidence nor judge the credibility of witnesses and the universal test accepted on appeal is simply whether there is some evidence competent and substantial before the jury fairly tending to sustain the verdict.

> *C-O-Two Fire Equipment Co. v. United States* (C. A. 9, 1952), 197 F. 2d 489, 491, cert. den. 37 S. Ct. 211, 344 U. S. 892, 97 L. Ed. 690;
>
> *Pasadena Research Laboratories v. United States* (C. A. 9, 1948), 169 F. 2d 375;
>
> *Woodward Laboratories v. United States* (C. A. 9, 1952), 198 F. 2d 995, 998;
>
> *Glasser v. United States,* 315 U. S. 60, 80;
>
> *United States v. Socony-Vacuum Oil Company,* 310 U. S. 150, 254;
>
> *Abrams v. United States,* 250 U. S. 616, 619.

Appellant's contention must necessarily be based entirely upon the question of credibility of witnesses because surely there can be no question in this case as to the sufficiency of the evidence if the jury believed appellee's witnesses. The kernel of appellant's contention, therefore, must be that the testimony of appellee's witnesses, and

principally that of witness Charles Rusty Thompson, is so incredible that as a matter of law it is inherently improbable and therefore this Appellate Court should sit as a trier of fact and so hold.

With reference to this proposition, in addition to those cases cited, *supra,* attention is respectfully invited to *Bridges v. United States* (C. A. 9, 1952), 199 F. 2d 811, reversed by the United States Supreme Court at 346 U. S. 209, after a grant of certiorari limited to the issue of whether or not the prosecution had been barred by the applicable statute of limitations. The case is significant, however, for its lengthy, careful and authoritative discussion of appellate review of sufficiency of the evidence and for its discussion of the attacks launched by the appellants against appellee's witnesses for their alleged bias, interest, inconsistent testimony, etc. (842-843). As to such consideration, the court held:

> "All of these matters were brought out on cross-examination and developed at great length during the trial. They were the subject of much argument by counsel for appellants at the time the case was argued to the jury and of course they are matters in respect to which the jury was the final judge."

In *Bridges, supra,* appellants also contended that certain evidence was inherently improbable. To this contention the court replied:

> "The question whether these events did or did not occur was typically one for the jury. In general this case presents no circumstances different from those which constantly appear where the testimony of witnesses is sharply in confiict. The special function of the jury in our system is to deal with such matters. No Appellant Judge is ever in a position to reconstruct for himself from a printed record the

multitude of things which bring conviction to the juror's mind—the demeanor of the witness, his apparent candor or evasiveness, his assurance or hesitation and even his facial expressions or the sound of his voice." (199 F. 2d at 839.)

On this proposition the United States Supreme Court in *United States v. Oregon Medical Society,* 343 U. S. 326, 339, stated it thusly:

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which the Appellate Judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * *. How can we say the judge is wrong? We never saw the witnesses * * *. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' (*Boyd v. Boyd,* 252 N. Y. 422, 429, 169 N. E. 632, 634.)"

In his brief appellant seems to concede the above mentioned principles when he states,

> "The ensuing discussion is not intended to entrench upon those legal principles which limit appellate review of jury verdicts. The contention here is that the evidence in this case fails to meet the very standards which govern review of the evidence by courts of the United States in order to prevent a miscarriage of justice" (App. Op. Br. p. 19).

It is difficult to determine with any degree of certainty just what the appellant means by this last statement. It is not unreasonable to conclude that he concedes

no legal grounds to urge reversal in the face of the firmly established legal principles governing Appellate review of jury verdicts; however, he blandly asserts that a miscarriage of justice has occurred in this case and therefore this court should reverse the judgment.

Appellant is engaging in circuitous reasoning in that there is only one way a miscarriage of justice could have occurred in this case which would be that the jury happened to believe appellee's witnesses, which takes us back to the proposition of credibility of which the jury was the final judge.

Appellant, in support of his contention that the evidence was not substantial, lacks sufficient rational probative force to justify submission to the jury in finding of guilt beyond a reasonable doubt, cites three 9th Circuit cases: *Mazurosky v. United States,* 100 F. 2d 958; *Muyers v. United States,* 89 F. 2d 784, and *Kuhn v. United States,* 26 F. 2d 463, all of which are not applicable to the problem here involved in that, without exception, the Appellate Court in each case, in holding that there was "no evidence" upon which to base a guilty verdict, gave *full* weight to the evidence and *full* credence to the witnesses. In other words in those cases, contrary to the wishes of the appellant in this case, the Appellate Court did not sit as a trier of fact, weighing the evidence and judging the credibility of witnesses.

Research has failed to disclose and appellant has cited no cases from this Circuit where this court has ever weighed the evidence or judged the credibility of wit-

nesses, but on the contrary this court has strictly adhered to the general rule on many occasions, its most recent expression on this subject in addition to those cases cited, *supra,* being *Adelman v. United States* (C. A. 9, 1954), 216 F. 2d 541. There may be isolated exceptional cases in other Circuits but in view of the universally established principle, and particularly in view of this court's strict adherence thereto, further comment under the circumstances is not deemed appropriate.

Appellant emphasizes with great zeal two minor inconsistencies in the testimony of appellant's witness, namely, the precise time the money was paid by Thompson to Benjocky for the photographic work, and the time arrangements were made by Thompson with Benjocky for such work. (App. Op. Br. pp. 45-48.) It must be remembered that these witnesses were testifying to events which occurred one year prior to their testimony in court and, further, that discrepancies are more likely to appear in regard to the testimony of a candid witness than in that of an astute perjurer. In any event, such conflicts as stated in the *Bridges* case, *supra,* were fully exploited by counsel before the jury and concerning which the jury was the sole judge.

Appellant in his argument in support of his contention that the evidence is insufficient to support his conviction has made an almost scurrilous attack upon the credibility of the government's principal witness, Thompson, but in view of the firmly established principles above set forth, a reply to such statements from a legal standpoint is not

deemed appropriate nor necessary, however, in the interest of fair play we feel it to be just and proper for us to briefly set the record straight, thereby exposing this ignominious attempt to destroy Thompson without support in the evidence.

(a) *Rusty Thompson's self interest was plain and his motive for falsifying clear* (App. Op. Br. p. 18). This has no foundation in the record. At the time of his testimony in this case he had already pleaded guilty to two felony counts and was awaiting sentence by District Judge Harrison [R. Tr. 186]. There is no evidence that he was promised probation, lesser sentence or anything else. Appellant's counsel propounded no questions to Thompson concerning this subject matter. The record discloses that Thompson was confined five or six months in jail prior to trial and was released O.R. only after appellant sought another continuance [R. Tr. 185-6]. There is no evidence indicating any bias or prejudice against appellant.

(b) *Rusty Thompson was a person of sordid and unsavory character* (App. Op. Br. p. 19). Thompson pleaded guilty to two felony counts in the present indictment but there was no evidence that he had ever been convicted of any previous crime in his lifetime. He served in the Marine Corps from 1942 to 1946 [R. Tr. 130]; he re-enlisted in the Marine Corps in 1950 [R. Tr. 131]; he graduated from United States Naval Air Station at Pensacola, Florida [R. Tr. 131]; he was a fighter pilot [R. Tr. 131]; he flew overseas in combat as a Technical Sergeant [R. Tr. 131]; he was honorably discharged from the Marine Corps in 1946 [R. Tr. 165].

2. Denial of Appellant's Motion for New Trial Based Upon Newly Discovered Evidence Was Not an Abuse of Discretion.

Appellant, on page 82, line 24 of his opening brief, has accused government counsel of a grave offense, namely, suppression of evidence. Before discussing the legal aspects of appellant's motion we ask permission of the court to meet this charge and clarify the record in respect thereto and, in addition, bring into focus the testimony which shows indubitably that Yvonne Fuller, during the trial, was not only known to appellant but was available to him as a witness.

Before commencement of the trial, counsel for the government had in his possession a written statement of Yvonne Fuller [see photostatic copy, C. Tr. 176]. Upon an examination of this statement in preparation for trial, it was apparent that Yvonne Fuller,—if she were to testify in accordance with said statement,—would tend to corroborate the testimony of witness Rusty Thompson in three material respects, namely, (1) that in December, she heard Rusty and Mr. Shibley talk about the Bennett case and about needing some papers from El Toro [C. Tr. 176]; (2) that the second time she went with Rusty to Bob's (Huckenpahler's) home (night of burglary) Rusty said "he was going to El Toro and get the papers George needs" [C. Tr. 176]; (3) that she saw Rusty hand the papers he got from El Toro, to George, and they went into the bedroom [C. Tr. 176].

In accordance with established practice, Yvonne Fuller was brought to the office of government counsel from the Ventura School for Girls, a state institution for juvenile delinquents, for interview in the presence of Deputy U. S. Marshal Bazar [C. Tr. 170]. Before any

questions were asked of her, she stated that she would not testify against George Shibley [C. Tr. 166, line 14]. She was thereupon informed by government counsel that the court would have to decide that question, and unless she refused to testify on a valid constitutional ground the court could hold her in contempt [C. Tr. 166, line 16]. She then stated she was a minor and was already in custody and that she would, under no circumstances, testify against appellant, whereupon she was excused [C. Tr. 166, line 19].

At the trial government witness Huckenpahler testified that on the night of the burglary a girl by the name of Yvonne was with Rusty [R. Tr. 74, line 14].

Appellant's counsel in his cross-examination of the government's next witness, Thompson, instead of making direct inquiry about Yvonne inferred by his questioning that she was a possible narcotic addict [R. Tr. 171, 172]:

> "Q. Now on December 19th you told us that you dressed up in your Marine uniform and you went over—you went to the Base and you took a copy of the transcript, is that right? A. That is correct.
>
> Q. On that night were you sober? A. I was.
>
> Q. Had you any type of narcotic? A. I did not.
>
> Q. Were you alone? A. When I went on the Base I was alone.
>
> Q. Before you went on the Base? A. I was in the company of a young lady prior to the time I went on the Base.
>
> Q. Were there any narcotics in the group? A. There were not.
>
> Q. Was the lady a known narcotic addict? A. To my knowledge, no.

Q. Well, you hesitate, do you mean she was or she was not. A. I mean I have heard some people say that she has taken narcotics.

Q. On this particular evening did you take narcotics? A. I did not.

Mr. Bowler: I am going to object to this line of interrogation. The girl, whoever she was, is not on trial and that has no bearing on the issues involved here. I object to it as immaterial and not proper impeachment."

After appellant's counsel had created the atmosphere that Thompson was out with a possible narcotic addict he dropped the subject and made no further inquiry, at which time government's counsel on re-direct examination of Thompson developed that the girl's name was Yvonne Fuller and that she was living in the home of appellant, as follows [R. Tr. 188]:

"Question by Mr. Bowler: Mr. Thompson, this girl that you apparently were with on the night of the 19th, referred to by Mr. Ball here as being a possible narcotic addict—do you know where she was living on the 19th of December? A. On the actual night of the 19th, no, but I will say that two weeks prior to that, I would know where she was living.

Q. Where was she living at that time? A. At Mr. George Shibley's house.

Q. And did you pick her up there that night? A. I think that I did.

The Court: Don't you know?

The Witness: No sir, she moved about that time and I am not sure whether I picked her up there or not.

Question by Mr. Bowler: Was she living at the Shibley house at the time you were staying there intermittently? A. That is correct.

Q. What is her name? A. Yvonne Fuller."

Then, on recross-examination of witness Thompson appellant's counsel persisted, still without mentioning her name, in pursuing a certain line of inquiry looking toward an explanation of the relationship between appellant and Yvonne Fuller, until stopped by the court as follows [R. Tr. 195, 196]:

"Question by Mr. Ball: Mr. Thompson, this lady whom you say you were with that night, the night of the 19th, that little girl was a little girl that had been paroled to Mrs. Shibley, the young lady sitting right here in front of me, by the Youth Authority of this State.

Mr. Bowler: That is objected to as calling for a conclusion of this witness.

The Court: I don't think that is proper, counsel, you must remember there is only one person on trial in this case now.

Mr. Ball: That is correct. Let me say this—that little girl was working as a maid in that home.

The Court: Let's not discuss her.

Mr. Ball: But he tried to bring out she was living there in Shibley's house. We want to show the situation.

Mr. Bowler: You can't show it by this witness. You might be able to show it by other witnesses.

The Court: Is she here?

Mr. Bowler: She is available, Your Honor, and we will have her here.

Mr. Ball: I won't pursue the question then.

The Court: I think you are getting on dangerous ground, counsel.

Mr. Ball: But I didn't want to leave any inferences at all. I won't pursue it, Your Honor; if Your Honor thinks it is immaterial, I won't go into it."

Pursuant to the court's inquiry and statement of government counsel, Yvonne Fuller was present and available in the United States Marshal's Office in the Federal Building each day during the trial [C. Tr. 166, line 24].

From the above quoted testimony it is apparent that there was no effort by government counsel to suppress evidence or secret this witness whose identity was brought out at the trial under his questioning of the witnesses and, further, was made available by him to appellant each and every day during the trial.

We now approach a brief discussion of the legal principles here involved. In general, a motion for a new trial based upon newly discovered evidence is looked upon with distrust and disfavor.

Casey v. United States (Cir. 9, 1927), 20 F. 2d 752, 754;

Nilva v. United States (C. A. 8, 1954), 212 F. 2d 115, 124.

The Court of Appeals will not substitute its judgment for that of the trial court where the latter did not act arbitrarily, capriciously or upon any erroneous concept of the law.

Gage v. United States (C. A. 9, 1948), 167 F. 2d 122, 125;

Joyce v. United States (Cir. 9, 1924), 294 Fed. 665.

The basic requirements establishing testimony of witnesses as newly discovered evidence are stated in *Johnson v. United States* (Cir. 8, 1929), 32 F. 2d 127, 130:

> "There must ordinarily be present and concur, five verities, to wit: (a) the evidence must be in fact newly discovered, *i. e.,* discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such a nature, as that on a new trial, the newly discovered evidence would probably produce an acquittal."

See: *Brandon v. United States* (C. A. 9, 1951), 190 F. 2d 175, 178.

(a) Was the Testimony of Yvonne Fuller Newly Discovered in the Legal Sense?

In order for evidence to be newly discovered so as to authorize a new trial the evidence must have been discovered since the trial. In other words, the evidence obtained after the trial must have been *unknown* and *unavailable* to the appellant himself at the time of trial. As stated in *Fogel v. United States,* 167 F. 2d 763, 765 (C. A. 5, 1948), reversed on other grounds, 335 U. S. 865, 93 L. Ed. 411:

> "The rule has long been established that evidence obtained after trial, in order to be newly discovered in a legal sense, must have been unknown and unavailable to the defendant at the time of his trial."

Here the appellant at time of trial not only had knowledge of the identity and whereabouts of Yvonne Fuller but, in addition, had knowledge that she was with Rusty Thompson on the very night the burglary was committed. Since the trial and conviction the activities of this night

were set up in her affidavit and submitted by appellant as newly discovered evidence.

In the case of *Coates v. United States* (C. A. D. C. 1949), 174 F. 2d 959, relied upon by appellant, it was clearly shown that the witness was *unknown* and *unavailable* at the time of trial. Likewise, the cases of *Hamilton v. United States* (C. A. D. C., 1943), 140 F. 2d 679, and *Griffin v. United States* (C. A. D. C., 1950), 183 F. 2d 990, 336 U. S. 704, 93 L. Ed. 993, also cited by appellant, are again distinguished by the fact that the evidence in those cases was *unknown* and *unavailable* to appellant at the time of trial.

For some apparent reason best known to appellant he refused to take advantage of the opportunity afforded him at the trial to call a witness whose identity was made clear, whose availability was made certain and whose relationship to the activities of Thompson on the very night of the burglary was abundantly apparent at the time of trial.

The court will not allow the appellant a "second guess regarding trial tactics."

> *United States v. Malfetti,* 117 Fed. Supp. 468, affirmed (Cir. 3) 213 F. 2d 728.

(b) The Testimony of the Affiant Yvonne Fuller Is Not Newly Discovered in the Legal Sense, It Being Merely Impeaching Evidence.

The purpose and nature of the affidavit by Yvonne Fuller is best explained by counsel for appellant himself in his presentation of the affidavit to the trial court at the time of his motion [R. Tr. 584].

> "Now since the trial we have discovered that there was a witness available who would contradict him

(Thompson) in material particulars; in other words, would state that on two or three instances where he made a statement that he told an untruth and we filed the affidavit of Yvonne Fuller with Your Honor."

In *Kramer v. United States* (Cir. 9, 1945), 147 F. 2d 202, 204, the general rule is stated that in newly discovered evidence merely intending to impeach or to lessen, but not to destroy the credibility of the witness, is not ground for a new trial.

Appellant relies on *Benton v. United States* (C. A. D. C.), 188 F. 2d 625, as establishing a rule with regard to a motion for new trial based upon newly discovered evidence; however, that was an exceptional case involving the testimony of a twelve-year-old child and the court reversed in the interest of justice and not on the basis of newly discovered evidence, the court stating the basis for its ruling as follows:

At page 627—

> "The motion for a new trial having been filed within five days after verdict, it need not be treated as grounded upon newly discovered evidence and judged by the standards applicable to motions so grounded * * *, and special factors to which we have referred are adequate to bring this case within the provision upon which we rely." (Rule 33, permitting a new trial, if required in the interest of justice.)

In conclusion it must be remembered that in considering appellant's motion for a new trial based upon newly discovered evidence, the trial court had before it three *statements* from this vacillating young lady; the statement heretofore referred to, in possession of government

counsel at trial [C. Tr. 176]; the affidavit relied upon by appellant as newly discovered evidence [C. Tr. 145]; and a third affidavit made only *three* days after the one relied on by appellant [Supp. C. Tr.], all of which are inconsistent in material respects.

On the basis of the law and the facts, one cannot conclude that the trial judge acted arbitrarily, capriciously or upon any erroneous concept of the law when he denied appellant's motion for new trial on the ground of newly discovered evidence.

3. The District Court Did Not Err in Excluding Certain of the Evidence Offered by Appellant to Establish Absence of Motive to Commit the Offenses Charged in the Indictment.

(a) Motive in the Instant Case Was Only a Circumstance to Be Considered by the Jury.

In order that appellant's objections may be viewed in proper perspective, the evidentiary value of motive in the instant case should be considered. In the court below appellant sought to show that the entire transcript of the Court of Inquiry "was a public record of a proceeding which he would have been entitled legally and in due course to receive, inspect, copy and retain, that he knew this and had no motive to arrange for its theft" (App. Op. Br. p. 93). While appellant uses the word "knew", in view of the issue of law involved, it is submitted that "believed" more accurately describes the state of mind sought to be established. Appellant's belief therefore, or absence of motive, is the state of mind toward which the offered evidence was directed.

Motive, however, is not an essential element of a crime. The prosecution is under no duty to establish

motive, nor is lack of motive, if established by the defendant, a defense. (*Pointer v. United States,* 151 U. S. 396, 413-416 (1894); *O'Leary v. United States,* 160 F. 2d 333, 335 (C. C. A. 9, 1947); Wigmore on Evidence, Third Edition, §118; 22 C. J. S., Criminal Law, §31.)

Nor is motive, in its true meaning and as it pertains to the case at bar, a "constituent element in the proof of unlawful intent," as appellant contends (App. Op. Br. pp. 92-93). Belief that one has a legal right to commit an act may in some cases negative the required intent to commit an offense (See, *Morissette v. United States,* 342 U. S. 246 (1952)); but when "motive" is employed in this sense, it generally means the good or bad faith *with which an act is committed,* or the *reason or grounds for its commission.* (See, Wigmore on Evidence, Third Edition, §119, for a discussion of some of the loose popular senses in which the word "motive" is used.) Evidence of appellant's belief, however, was admissible only for the purpose of rendering it less probable that he committed the crimes charged (Wigmore on Evidence, Third Edition, §§117, 118.)

The cases relied upon by appellant therefore are distinguishable from the case at bar. In those cases, the state of mind sought to be established *would have negated an essential element of the crime charged.* For example, in *C.I.T. Corp. v. United States,* 150 F. 2d 85 (C. C. A. 9, 1945), the crime charged was conspiring to cause to be made an instrument knowing the same to be false and for the purpose of influencing the action of the Federal Housing Administration. Knowledge of falsity and an intent to use the falsehood for such influence were essential elements of the crime, and evidence offered tended to show that appellant did not have the necessary

knowledge and intent. Similarly, in *Hersh v. United States,* 68 F. 2d 799 (C. C. A. 9, 1934), and *Miller v. United States,* 120 F. 2d 968 (C. C. A. 10, 1941), an intent to defraud was an essential element of the crimes charged, and the state of mind sought to be proved, if established, would have prevented conviction.

In the instant case, however, even if appellant "believed" that he had a legal right to inspect, copy and receive a copy of the transcript of proceedings before the Court of Inquiry, the jury was nonetheless free to find that appellant had the intent and guilty knowledge required to commit the offenses of which he was convicted. As Mr. Justice Harlan observed in *Pointer v. United States, supra* (p. 414):

> "* * * The absence of evidence suggesting a motive for the commission of the crime charged is *a circumstance* in favor of the accused, to be given *such weight as the jury deems proper;* but proof of motive is *never indispensable.*" (Emphasis added.)

In the instant case, therefore, the presence or absence of motive was only a circumstance to be considered by the jury, together with all the other facts and circumstances of the case. The District Court recognized this, and did not prevent appellant from establishing lack of motive [R. Tr. 312]. The court, moreover, properly and adequately instructed the jury as to the weight to be given this evidence [R. Tr. 476-477].

(b) The District Court Properly Excluded the Testimony of Mr. Marshall to Show Motive.

The court below did not err in excluding testimony of Mr. Marshall as to the advice he gave appellant concerning his legal right to obtain a transcript of pro-

ceedings before the Court of Inquiry [R. Tr. 275-276, 282]. Nor was it error to exclude the telephone conversation between Mr. Marshall and appellant in which Mr. Marshall informed appellant that he had examined a portion of the transcript in the office of the United States Attorney. This testimony, if relevant at all, was only relevant to establish appellant's belief concerning his legal rights to inspect, copy, and obtain a copy of the transcript.

While one may testify as to his own belief, when material and relevant (*Buchanan v. United States,* 233 Fed. 257, 259 (C. C. A. 8, 1916), the admissibility of the testimony of others as to what they told the person whose belief is to be established is discretionary with the trial court, especially where such belief is itself only circumstantial evidence. This court in *Finn v. United States of America,* No. 14,479 (C. A. 9, Jan. 7, 1955—not yet reported), commented upon the precise question here involved:

> "It is to be pointed out that the trial court almost without restriction let the defendants testify as to what they 'thought.' However, the pattern of its rulings was generally to exclude documents, papers and statements of others made to the Finns that would have tended to show how they happened to think the way they said they thought. Such collateral matter is ordinarily inadmissible and wisely so."

Here, too, appellant was permitted to testify without restriction as to his belief [R. Tr. 316-319, 344-345]. However, in view of the fact that appellant's belief was itself only circumstantial evidence, the testimony of Mr. Marshall which might tend to establish such belief becomes extremely remote. The danger of admitting such

testimony is emphasized when it is considered that one's belief may be the result of conversations with hundreds of persons. Where testimony of a collateral nature is offered, and its relevancy is slight, its admissibility rests largely within the discretion of the trial judge.

> *Schindler v. United States,* 208 F. 2d 289, 290 (C. A. 9, 1953), cert. den. 347 U. S. 938;
>
> *Randle v. United States,* 113 F. 2d 945 (C. A. D. C., 1940).

Assuming, however, that an attorney may in some cases testify as to the information and advice he gave his client, the testimony offered in the court below had no probative value, since *the record contains no evidence that appellant relied upon the information received from Mr. Marshall in forming his alleged belief.* Indeed, upon cross-examination, appellant made it manifestly clear that his belief was based, not upon information received from Mr. Marshall, but upon his own research into the matter [R. Tr. 344-345]:

> "Q. Now, tell me this. You had an interest in this transcript. It was important to you. What did you base your opinion on as a lawyer that entitled you to the full transcript of the proceedings before the Court of Inquiry. Just name them. A. I based it upon the *common law military as I understand it.*
>
> Q. I am talking about the new military code as you know. A. The common law military is part of the new military code and has been expressly declared so to be by the Court of Military Appeals and by the boards of review.
>
> Q. Give us the section that you relied upon in forming your opinion, if you will. A. The specific thing that I refer, to, Mr. Bowler, is a section or quotations in the law relating to the United States Navy. I think it was 1921, the first edition which

> I inherited from John J. Monahan, God rest his soul, in which was said that *these transcripts are public records and it is against the spirit of the country to deny any civilian access to them.*" (Emphasis added.)

A comparison of the above-quoted testimony with the offer of proof made by appellant [R. Tr. 282-283] discloses that appellant not only arrived at his supposed belief independent of information received from Mr. Marshall, but also that appellant's belief differed materially from the advice of Mr. Marshall. In his offer appellant sought to show that Mr. Marshall "advised Mr. Shibley that *if proceedings were filed against him* in the Federal Court for contempt of the Court of Inquiry that he would be entitled to a transcript of the proceedings" [Emphasis added; R. Tr. 282-283]. As indicated from the above quoted testimony, appellant based his belief upon his contention that "these transcripts are public records."

Moreover, at the time the testimony of Mr. Marshall was offered, no evidence whatever had been presented to the Court that appellant believed he had a right to the transcript of proceedings before the Court of Inquiry. In the absence of such evidence, the testimony of Mr. Marshall as to any information given appellant could only serve to confuse the jury and lead them to believe that appellant *in fact had a legal right to obtain a copy of the transcript.* A judge has discretion to rule out even relevant evidence if it is not cogent and is more likely to distract than inform the jury.

> *Schindler v. United States, supra;*
> *Randle v. United States, supra.*

Since the testimony of Mr. Marshall had no probative value to establish appellant's state of mind, it could

only have been offered for the purpose of proving the truth of its contents, namely, that appellant in fact had a legal right to obtain a copy of the transcript. As such, the testimony was not only hearsay, but would have permitted the introduction in evidence of self-serving declarations made by appellant himself. (*Shreve v. United States,* 103 F. 2d 796 (C. C. A. 9, 1939) cert. den. 308 U. S. 570; *Lane v. United States,* 142 F. 2d 249 (C. C. A. 9, 1944).) Moreover, this testimony would have encroached upon the function of the trial court in passing upon questions of law. (*Bayless v. United States,* 200 F. 2d 113, 115 (C. A. 9, 1952), cert. den. 345 U. S. 929; *Meyers v. United States,* 174 F. 2d 329, 335 (C. A. 8, 1949), cert. den. 338 U. S. 849.) The fact that the District Court did not exclude the offered testimony upon all of the grounds discussed above will not prevent this court from sustaining the lower court's ruling if there were any grounds upon which exclusion was proper.

> *Wagner v. United States,* 67 F. 2d 656 (C. C. A. 9, 1933);
>
> *Kalloch v. Hoagland,* 239 Fed. 252, 255 (C. C. A. 6, 1917).

(c) The Court Did Not Err in Excluding Testimony of Appellant Concerning a Conversation Between Him and Mr. Marshall.

Appellant seems to complain of the exclusion by the court of testimony of appellant concerning a purported conversation between him and Mr. Marshall [R. Tr. 312]. No offer of proof was made as to the exclusion of this testimony, and it may well be doubted whether the objection is properly before this Court.

> *Elder v. United States,* 202 F. 2d 465, 467 (C. A. 9, 1953), cert. den. 345 U. S. 999.

Assuming, however, that the exclusion may now be complained of, it does not constitute error. This testimony, too, would only be relevant to establish appellant's belief, and as previously discussed, appellant did not rely upon information received from Mr. Marshall in forming his alleged belief. Any testimony of appellant as to a conversation between him and Mr. Marshall could only have been offered to prove the truth of its contents, and as such would be hearsay and permit the introduction of self-serving declarations made by appellant during such conversation.

Shreve v. United States, supra;

Lane v. United States, supra.

(d) The Exclusion of the Evidence Complained of, Even If Error, Was Not Prejudicial.

Appellant was not prevented from introducing evidence to establish absence of motive. Appellant was permitted to testify that on the 10th of December, 1952 he had an opinion as to whether he would or would not be entitled to a transcript of the proceedings before the Court of Inquiry [R. Tr. 316-317]; that his opinion as a lawyer was that he had an absolute right not only to read, inspect and copy the transcript and the full record of the Court of Inquiry, but also to be furnished free of charge by the Government, a copy of the whole thing; that he had a conference with his attorney in which the matter was discussed [R. Tr. 317].

Appellant was further permitted to testify that he had knowledge of the fact that the transcript of his testimony before the Court of Inquiry had been forwarded to the office of the United States Attorney; that he received information on December 12 that the transcript

was being forwarded; that he knew this record had been made available for inspection by his attorney, Mr. Marshall; that Mr. Marshall had told him so; that he received this information from his lawyer on either the 15th or 16th [R. Tr. 318-319].

Appellant thus had ample opportunity to establish absence of motive; therefore, even if it be assumed that the exclusion of the evidence complained of was erroneous, it was not prejudicial. A judgment of conviction will not be reversed merely because a technical error may have been committed.

> Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. A.;
>
> *Zamloch v. United States,* 193 F. 2d 889, 892 (C. A. 9, 1952), cert. den. 343 U. S. 934.

4. The Trial Court Properly Refused the Instructions Proposed by Appellant as to Appellant's Legal Rights to Obtain a Copy of the Transcript of the Court of Inquiry. The Instruction Given by the Court on This Subject Was More Favorable Than That to Which Appellant Was Entitled.

(a) The Trial Court Properly Refused the Instructions Proposed by Appellant.

That appellant was entitled to an instruction defining his legal rights to obtain a copy of the transcript of proceedings before the Court of Inquiry is extremely doubtful. It was appellant's *belief as to his legal rights,* and *not his actual legal rights,* which was relevant as tending to show that appellant probably did not commit the crimes charged. Defining appellant's actual legal rights would tend to confuse the jury and lead them to believe that his guilt or innocence depended upon such rights. Appellant's actual legal rights were so remote

from the primary issues in the case, that numerous instructions pertaining to military law and regulations would have served only to add emphasis to appellant's theory of the case. Where an instruction seeks to add emphasis to an evidentiary fact or is misleading, it may properly be refused.

> *United States v. Sylvanus,* 192 F. 2d 96, 109 (C. A. 7, 1951), cert. den. 342 U. S. 943.

Assuming, however, that appellant was entitled to an instruction on the subject, those instructions proposed by him were properly rejected. The first prerequisite of an instruction is that it should correctly state the law. (*Pine v. United States,* 135 F. 2d 353 (C. A. 5, 1953), cert. den. 320 U. S. 740; *Timell v. United States,* 5 F. 2d 901, 902 (C. C. A. 9, 1925); 12 Cyclopedia of Federal Procedure, §48.228.) The instructions proposed by appellant did not fulfill this requirement. Appellant proposed an instruction which provided:

> "The Court instructs you that in determining whether or not Defendant Shibley had a motive for the commission of the offenses charged against him, you may take into consideration that the Court of Inquiry was a *court of the United States* and before December 19, 1952, the record of said Court of Inquiry was a *public record.* Furthermore, you are instructed that Defendant Shibley as a member of the general public was *entitled as a matter of law, to inspect the record* of the Court of Inquiry proceedings *before December 19, 1952"* [Prop. Inst. No. ....., C. Tr. 72]. (Emphasis added.)

The foregoing instruction is erroneous in that a Court of Inquiry is not a judicial, but an investigative body; the record of its proceedings are not open to public in-

spection, but have been made privileged and confidential by regulation; and appellant, either as an individual or as a member of the general public, did not have a legal right to inspect the record of its proceedings.

The function of courts of inquiry is to ascertain facts for the information of superior authority, and it has been likened to that of the civilian grand jury. (8 Opinions, Attorney General, 335, 347, 349 (1857).) Although by statute courts of inquiry have been granted power to summon witnesses and to make findings of fact (Article 135, Uniform Code of Military Justice, 64 Stat. 143, 50 U. S. C. A., §731), their duties are investigative and not judicial in nature.

> *United States v. Shibley,* 112 Fed. Supp. 734, 743, 747 (D. C. S. D. Calif., 1953);
>
> The Wright, 2 Fed. Supp. 43 (D. C., E. D. N. Y., 1932);
>
> 25 Opinions, Attorney General, 623, 625 (1906);
>
> 6 C. J. S., Army and Navy, 48-50.

In Winthrop's Military Law and Precedents, Second Edition (Reprint 1920), the nature of a Court of Inquiry is described as follows (p. 517):

> "The Court of Inquiry, so called, is really not a court at all. No criminal issue is formed before it, it arraigns no prisoner, receives no plea, makes no finding of guilt or innocence, awards no punishment. Its proceedings are not a trial, nor is its opinion (when it expresses one), a judgment. It does not administer justice, and is not sworn to do so, but simply to 'examine and inquire.' "

And in *United States v. Shibley, supra,* Judge Yankwich observed (747):

> "A Court of Inquiry does not exercise judicial function. It can only express opinions *when requested to do so,* and make findings of fact. It cannot punish anyone, least of all a civilian witness * * *." (Emphasis that of the court.)

Nor are records of proceedings before Courts of Inquiry open for inspection by the general public. Even in the absence of regulation, the very nature of these bodies would preclude the indiscriminate disclosure of their records. Courts of Inquiry investigate a variety of matters pertaining to the military establishment. Their proceedings may adversely affect the reputation of persons who have never been placed on trial. Records of their proceedings oftentimes contain information which in the best interests of national security should not be disclosed. Certainly, the records of the formal investigative bodies of the armed forces should not become public property.

The confidential nature of these records, however, was not left to inference. Section 3 of the Act of June 11, 1946, 60 Stat. 238, 5 U. S. C. A., §1002 (commonly referred to as the Administrative Procedure Act), which provides for the inspection of certain records and documents, specifically excepts those required for good cause to be held confidential. In accordance with this exception, and pursuant to authority conferred upon him by Section 161 of the Revised Statutes of the United States, 5 U. S. C. A., §22, the Secretary of the Navy promulgated a regulation which specifically made records of proceedings before Courts of Inquiry confidential. This regulation (32 C. F. R., §701.2(b), 16 F. R. 12505) provides:

"(b) The records of proceedings of Navy courts-martial, *courts of inquiry,* boards of investigations and administrative reports are *intended solely for use in the Naval Establishment* and are *privileged.* Such records or documents are *confidential for good cause found,* within the meaning of the Administrative Procedure Act. The Secretary of the Navy, or his designee, *may* make such records or information therefrom available to persons properly and directly concerned whether or not litigation is involved." (Emphasis added.)

The above-quoted regulation has the force and effect of law (*A., T. & S. F. Ry. v. Scarlett,* 300 U. S. 471 (1937), and appellant was bound thereby. Even if appellant could be construed as a person "properly and directly concerned" with the record of the Court of Inquiry Proceedings, he did not have a right, as a matter of law, to inspect or copy this record. The release of these records or information therefrom was discretionary with the Secretary of the Navy or his designee.

Indeed, in his Opening Brief, appellant seems to have abandoned the premise that records of courts of inquiry are public records. He now seems to contend that appellant would have been entitled to a copy of the record as a result of contempt proceedings instituted against him. Contempt proceedings, however, were *not commenced against appellant until January 28, 1953* (see, *United States v. Shibley,* 112 Fed. Supp. 734, at 738; and also, App. Op. Br. p. 31); while appellant's proposed instructions asked that his legal rights be defined as of December 19, 1952.

In defining appellant's legal rights as of December 19, 1952, the trial court was not required to assume that

certain events would subsequently transpire: that the United States Attorney would decide in favor of instituting contempt proceedings against appellant; that an information would be filed on January 28, 1953; and that as a result thereof a trial would take place. *Even appellant himself testified that he did not believe the contempt information would be filed* [R. Tr. 340].

Other instructions proposed by appellant were equally erroneous as the one quoted above. Appellant's No. 19 [C. Tr. 71] is incorrect since it states that appellant as a matter of law had a right to inspect the record or a copy thereof prior to December 19, 1952. As previously discussed, appellant had no such legal right. Appellant's No. 20 [C. Tr. 73] is incorrect for the same reason.

Appellant proposed another instruction which provided:

> "You are instructed as a matter of law that *if you conclude that the Court of Inquiry in question was a Court of the United States,* the record of its proceedings was a public record before December 19, 1952" [C. Tr. 74]. (Emphasis added.)

The above quoted instruction is in error because it imposes upon the jury the duty of deciding whether the Court of Inquiry was a Court of the United States. This is a question of law within the exclusive province of the Court. (*Corson v. United States,* 147 F. 2d 437, 438 (C. C. A. 9, 1944).) Appellant's No. 24 [C. Tr. 75] was objectionable for the same reason.

Appellant's No. 21 [C. Tr. 76], relating to issuance of a letter of censure, was likewise erroneous. Under Sec-

tion 0314 c. (3) of the Naval Supplement to the Manual for Courts-Martial, 1951, cited by appellant in support of this instruction, a letter of censure constitutes non-judicial punishment under Article 15 of the Uniform Code of Military Justice, 64 Stat. 112, 50 U. S. C. A., §571. Article 15 provides for punishment of military personnel, and not civilians. The record contains no evidence that appellant, a civilian, was a person subject to punishment by military authorities. (See Article 2, Uniform Code of Military Justice, 64 Stat. 109, 50 U. S. C. A., §552, for persons subject to the Code; *Ex parte Drainer,* 65 Fed. Supp. 410 (D. C., N. D. Calif., 1946), affirmed *sub. nom. Gould v. Drainer,* 158 F. 2d 981 (C. C. A. 9, 1947); *Ex parte Wilson,* 33 F. 2d 214 (D. C., E. D. Va., 1929); *United States v. MacDonald,* 265 F. 695 (D. C., E. D. N. Y., 1920); Winthrop's Military Law and Precedents, 2d Ed. (Reprint 1920), p. 89.)

(b) The Instruction Given by the Trial Court Was More Favorable Than That to Which Appellant Was Entitled.

Appellant seems to refer disparagingly to the fact that the trial court "simply improvised his own instruction" (App. Br. p. 103). There is no requirement that the court employ language proposed by counsel in formulating his charge. The trial judge is free to prepare his own instructions. (*Wright v. United States,* 175 F. 2d 384, 388 (C. A. 8, 1949), cert. den. 338 U. S. 873.)

The instruction given by the court below [R. Tr. 476] was more than fair to appellant. As previously discussed in (a) above, the Court was not required to speculate as

to future occurrences in order to define appellant's legal rights as of December 19, 1952. The Court could have instructed the jury that as of December 19, 1952, appellant had no legal right to obtain a copy of the transcript of proceedings before the Court of Inquiry. The Court could have instructed the jury that as of December 19, 1952, appellant's legal right to obtain a copy of the transcript in the future was not certain, but would depend upon future events which were not bound to occur at the time of the offenses charged. Yet, in deference to appellant's own theory of defense, the court instructed the jury that appellant would eventually be entitled to receive the transcript of the Court of Inquiry proceedings affecting him. This instruction was more favorable than that to which appellant was entitled. Where an error in an instruction is favorable to appellant, it cannot be relied upon for reversal. (*Stevens v. United States,* 206 F. 2d 64 (C. A. 6, 1953).)

The trial court properly directed the jury that they were not to conclude from the fact that appellant would eventually he entitled to the record that he would be entitled to unlawfully remove or conspire to remove said record from the Marine Base. Such a conclusion was likely to be drawn by laymen, unfamiliar with matters of law; and it was the duty of the trial judge to see that the evidence was viewed in proper perspective.

5. The Exclusion of the Reputation Evidence Was Not Error. The Summation of the Prosecutor Was Not Prejudicial. There Was No Coercion of the Jury Verdict. No Illegal Sentence Was Imposed. Defendant Had a Fair Trial and Was Not Deprived of His Liberty Without Due Process of Law.

(a) The Court Did Not Err in Striking the Testimony of Appellant's Witness as to the Bad Reputation of Thompson in the Community.

To more fully understand the basis for the court's ruling in striking this evidence in its entirety, pertinent portions of the testimony of witness J. W. Worley are herein set forth [R. Tr. 351-354]:

> Q. Captain Worley, do you know what Mr. Charles Thompson's reputation was in the City of Long Beach during the years 1952 and 1953, for truth, honesty and integrity? You can answer that "Yes," or "no."
>
> Mr. Bowler: Objected to, your Honor, on the ground there is no proper foundation laid, no proper foundation has been laid thus far for the question or the answer. It is the general reputation.
>
> The Court: I think you had better tell the witness what "reputation" means if he doesn't already know. It isn't what he thinks of him, it is what the public thinks of him.
>
> Q. By Mr. Ball: And how long did he work for you? A. About ten months.
>
> Q. From what dates? A. I employed him on July 11, 1952 and he disappeared on May 6, 1953.
>
> Q. Was that the end of his employment? A. That is right.

Q. Now, have you—do you understand what I am talking about when I use the term "reputation"? A. I do.

Q. And you know that Rusty Thompson lived in Long Beach during that period, do you, that he worked for you? A. Yes, I do.

Q. The ten month period? A. That is right.

Q. Have you talked to any people about him since then? A. Yes, I have talked to a lot of people.

Q. You needn't tell whom you talked with—simply tell me whether you have. A. I have.

Q. And have you discussed his reputation with various people in the community? Answer that "Yes," or "No." A. Yes.

Q. Now, do you know at this time what his reputation was in Long Beach in that period, 1952 to 1953, for truth, honesty and integrity? Just a minute —answer "Yes," or "No," whether you know. A. Yes.

Q. What was it—was it good or bad? A. Very bad.

Q. Would you believe him under oath? A. I sure would not.

Mr. Ball: You may cross-examine.

The Court: You employed him for ten months and he left voluntarily, didn't he?

The Witness: He ducked out, yes.

The Court: You ran a detective agency in the State of California?

The Witness: I did.

The Court: And employed that kind of a man?

The Witness: *I didn't know he was that kind of a man until he got into this mess here, and he stole a lot of money from me and a lot of other people's in Long Beach.*

The Court: This case wouldn't help anybody's reputation, would it?

The Witness: I wouldn't think so, no. It surely didn't do me any good although I didn't know anything about it.

Cross-Examination

By Mr. Bowler:

Q. You are giving us your own personal opinion here today? A. Yes, what I know of Mr. Thompson.

Q. It is your own personal opinion of Mr. Thompson? A. Yes, sir.

Mr. Bowler: I ask that his entire testimony be stricken, your Honor, on the ground it is not proper character evidence. He is giving his own personal opinion and not reputation evidence, and I ask that the jury be admonished to disregard his entire testimony.

The Court: And the motion will be granted. (Emphasis added.)

After this ruling there followed a colloquy between Court and counsel as follows [R. Tr. 356, 357]:

The Court: May I interrupt for just a moment? He said he employed him up until May of this year and he didn't know anything about his reputation until since then?

Mr. Ball: He found out about it later.

The Court: That is, after the happening of this event?

Mr. Ball: Yes.

The Court: You can't truthfully say that a man's reputation is good after an indictment; but we are only interested in his reputation up to the time the man was accused of an offense.

Mr. Ball: But he said he talked to other people since, and there were a lot of other facts that came

to his attention since he left, that gave him that opinion.

The Court: I am going to strike it, counsel, and instruct the jury to disregard it. I think anybody's reputation after they have been indicted by a grand jury is subject to question; at least I would question such a man's reputation.

It is apparent that one basis for the court's ruling is to be found in that portion of the testimony above quoted, wherein witness Worley had finished testifying that he knew Thompson's reputation in Long Beach in the period from 1952 to 1953 to be very bad, and the court then questioned witness Worley's employment of "that kind of a man" in his detective agency, to which Worley responded with the statement emphasized above, that he didn't find out about Thompson until after "this mess here," indicating that his information came to him after Thompson was indicted.

The court's inquisitive question giving rise to this startling response placed witness Worley squarely in the position where he either had to admit employing in his detective agency an individual whose reputation in the community he knew to be very bad, and indeed so bad he wouldn't believe him under oath, *or* destroy himself as a reputation witness by admitting clearly and unequivocally that he (Worley) didn't know that he (Thompson) was "that kind of man," until he "got into this mess here." He chose the latter.

Rusty Thompson whose reputation was being assailed was a party to the controversy. He was a co-defendant with appellant and had previously entered a plea of guilty to the indictment which was published June 25, 1953 [C. Tr. 2].

With reference to this subject of subsequent reputation testimony the court's attention is respectfully invited to *Wigmore, Evidence* (3d Ed.), Volume V, §1618 at page 492, wherein the learned author clearly states the rule:

> "Where the desired character is that of a party—for example, the defendant in a criminal charge * * * it is obvious that after the charge has become a matter of public discussion and partisan feeling on either side has had an opportunity to produce an effect, a false reputation is likely to be created * * *. The safeguards of trustfulness are lacking. Accordingly, it is generally agreed that a reputation at any time after a charge is published or other controversy begun is not admissible."

See:

Spurr v. United States, 87 Fed. 701 (6 Cir., 1898).

The court's ruling striking this testimony should be sustained upon still another ground, namely, that Worley gave his individual opinion based upon his own personal observations rather than community reputation. The basis for the court's ruling is found in the same statement by Worley, again set forth for the court's consideration [R. Tr. 354]:

> "The Court: And employed that kind of man?
> The Witness: I didn't know he was that kind of man until he got into this mess here, and he stole a lot of money from me and a lot of other people's in Long Beach."

It is clear that Worley based his opinion not on community reputation but on his own knowledge of the indictment and specific acts of stealing.

The leading case on this subject is *Michelson v. United States,* 335 U. S. 469, 477, wherein the Supreme Court stated it thusly:

"Not only is he permitted to call witnesses to testify from hearsay but, indeed, such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation.' *The witness may not testify about defendant's specific acts or courses of conduct, or his possession of a particular disposition as of benign mental or moral traits; nor can he testify that his own acquaintance, observation and knowledge of defendant leads to his own independent opinion that defendant possessed a good, general or specific character inconsistent with the commission of acts charged.*" (Emphasis added.)

This entire matter of reputation evidence is one in which the courts of last resort have invested the trial courts with wide discretionary powers in dealing with this type of evidence. On this subject the Supreme Court in the *Michelson* case, *supra,* stated at page 480:

"Both proprietary and abuse of hearsay reputation testimony, on both sides, depends on numerous and subtle considerations difficult to detect or appraise from a cold record and therefore rarely and only on clear showing of prejudicial abuse of discretion will courts of appeal disturb rulings of trial courts on this subject."

(b) The Summation of the Prosecutor Was Not an Appeal to Passion and Prejudice for the Purpose of Overcoming the Dispassionate Judgment of the Jury.

Remarks of government counsel when viewed in their proper relationship to the evidence did not prejudice the appellant. The evidence disclosed the situs of the crime to be a government echelon [Govt. Exs. 1, 2, 3, 4].

The conspiracy had as one of its objectives the entering of a governmental installation for the purpose of committing larceny [C. Tr. 2]. Such acts, to go unpunished, are in truth and in fact a threat to our security and the article taken, whether it be a lead pencil or an atom secret, does not alter the principle involved. Furthermore, no objection was made during or following the prosecutor's argument, nor was the court requested to admonish the jury as to its force.

Reference is made to the often quoted Supreme Court case covering the subject-matter of failing to object to alleged impropriety, *United States v. Socony-Vacuum Oil Company,* 310 U. S. 150, wherein there is a rather full treatment of this proposition of law commencing at page 237. We quote from pages 238-239, as follows:

> "In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

The courts are generally to the same effect:

Allen v. United States (C. A. 5, 1951), 192 F. 2d 570;

Heald v. United States (C. A. 10, 1949), 175 F. 2d 878, 882;

Vendetti v. United States (9 Cir., 1930), 45 F. 2d 543;

Pacman v. United States (9 Cir., 1944), 144 F. 2d 562.

(c) The Conduct and Statements of the Trial Court Did Not Coerce the Verdict of the Jury and Did Not Constitute Error.

The jury had returned for an explanation of certain instructions [R. Tr. 561]. Pursuant to their request the court re-read the instructions on the law of conspiracy [R. Tr. 562-567]. The court then gave the instruction complained about, as follows [R. Tr. 568-570]:[2]

> "The Court: Yes, ladies and gentlemen, this is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The court is of the opinion that the case cannot be tried better or more exhaustively than it has been on either

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[2]*Cf.* the Allis instruction (approved in the *Allen* case), *infra,* which was as follows:

> "This is an important case. The trial has been long and expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive. The Court is of the opinion that the case cannot be again tried better or more exhaustively than it has been on either side. It is therefore very desirable that you should agree upon a verdict. The court does not desire any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly, according to the law and the evidence. And, although the verdict, to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring the 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. In the present case the burden of proof is on the United States to establish its case beyond a reasonable doubt, and if, upon any count of the indictment submitted to you, you have a reasonable doubt,

side. It is therefore very desirable that you should agree upon a verdict. The court does not desire that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly according to the law and evidence, and, although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring 12 minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner and from the same source from which any future

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based upon the evidence, of the guilt of the defendant, you ought to acquit him on that count. But, in conferring together, you ought to pay proper respect to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows. In order to acquit the defendant of the 17 charges submitted to you, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you find that he is guilty of any one of them, you should return a verdict of guilty. You may conduct your deliberations as you choose, but I suggest that you now retire and carefully consider again the evidence relating to a few counts, for instance the fourteenth and fifteenth, or the eighth and ninth, and to call your attention to them more clearly I will again read to you that portion of the charge relating to the claims of the parties concerning these four counts."

jury may be and there is no reason to suppose that the case will ever be submitted to 12 men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.

In the present case the burden of proof is on the United States to establish its case beyond a reasonable doubt and if, upon any count of the indictment submitted to you, you have a reasonable doubt, based upon the evidence, of the guilt of the defendant, you ought to acquit him on that count. But, in conferring together, you ought to pay proper respect to each other's opinions, with a disposition to be convinced by each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

And on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

Then the following colloquy took place [R. Tr. 571, 572]:

"Mr. Ball: We make an exception to the last instruction upon the ground that the defendant is entitled to the individual opinion of each and every juror.

The Court: I think I said that in my instruction. Of course, this does not supplement the other instruction given you ladies and gentlemen. You must bear in mind all of the other instructions that I have given you. I am simply, in this case, trying to follow the language of the United States Court in *Allen v. United States.*

Mr. Ball: Also, on the ground that no matter what time the jury is out—in other words, the elapse of time is immaterial. Any juror is entitled to maintain his conviction.

The Court: I don't want any juror to surrender his honest conviction under any circumstances.

Mr. Ball: That is right, every juror must maintain his honest conviction, no matter what time elapses.

The Court: I don't want anybody to surrender their honest conviction under any circumstances but, however, that is your problem. I might say that I will be here until noon and after that time I am going to return home. And I think counsel will also want to be on their way. They can assemble in about an hour or so on notice, any time between now and tomorrow evening.

Mr. Bowler: That is right.

Mr. Ball: Well, your Honor, I am in this position—that no sacrifice of time will make any difference to me. I will be here at the disposal of my client no matter when it is, to properly defend him and see that he is properly defended.

The Court: Well, we are all in the same boat, gentlemen, counsel on both sides and the court. We are at the mercy of the jury."

In giving the supplemental instruction the court followed a practice which has long been approved and held proper by federal courts.

Allis v. United States (C. C., E. D. Kan., 1893), 73 Fed. 165, aff. 155 U. S. 117;

Allen v. United States, 164 U. S. 492;

Boehm v. United States (8 Cir., 1941), 123 F. 2d 791, 812, cert. den. 315 U. S. 800, rehear. den. 315 U. S. 828;

Suslak v. United States (9 Cir., 1914), 230 Fed. 913, 919;

Shea v. United States (9 Cir., 1919), 260 Fed. 807, 808;

Kawakita v. United States (C. A. 9, 1952), 190 F. 2d 506, aff. 342 U. S. 932.

In the *Boehm* case, *supra,* at page 812, the court approved the practice in the following language:

> "It was plainly the duty of the trial judge to seriously and earnestly impress upon the jury that they also had a sworn duty transcending personal inclination, to make true deliverance between the government and the accused. As the judge said nothing to tilt the scale in the jury's hands, either for or against the appellant, it cannot be said that he improperly coerced the verdict."

The complained of instruction is commonly known as the *"Allen"* instruction and has been approved in one form or another in every circuit where such instruction

has been challenged on appeal, when the court made no inquiry concerning the division of the jury.[3]

The charge given by the court in the case at bar, set out in full *supra,* reveals that the trial judge omitted but two portions of the charge given in the *Allis* case set out at length in footnote 2. He omitted two portions of the *"Allen"* instruction, one omission certainly not being harmful to appellant,[4] and the other clearly favorable:[5]

The Second Circuit Court in approving the use of the *"Allen"* charge in *United States v. Olweiss* (2 Cir., 1944), 138 F. 2d 798 at 801, *supra,* and quoted in *United States*

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[3]*Boston & M. R.R. v. Stewart* (1 Cir., 1918), 254 Fed. 14 at 18; *United States v. Dunkel* (2 Cir., 1949), 173 F. 2d 506 at 508; *United States v. Olweiss* (2 Cir., 1944), 138, F. 2d 798; *Lias v. United States* (4 Cir., 1931), 51 F. 2d 215 at 218, aff. 284 U. S. 584; *Weathers v. United States* (5 Cir., 1942), 126 F. 2d 118; *Israel v. United States* (6 Cir., 1925), 3 Fed. 743 at 745; *Paschen v. United States* (7 Cir., 1934), 70 F. 2d 491 at 503; *Bowen v. United States* (8 Cir., 1946), 153 F. 2d 747; *Wright v. United States* (8 Cir., 1949), 175 F. 2d 384 at 388; *Shepherd v. United States* (9 Cir., 1916), 236 Fed. 73 at 78; *Shea v. United States* (9 Cir., 1919), 260 Fed. 807, *supra; Suslak v. United States* (9 Cir., 1940), 213 Fed. 913, *supra; Speak v. United States* (10 Cir., 1947), 161 F. 2d 562, 564; *Bord v. United States* (C. A., D. C., 1942), 133 F. 2d 313.

[4]"The court and the jury are here to come to a just and righteous result. No doubt you are as anxious to reach it as am I. So anxious is the court that, having spent now two weeks in the trial of this cause, I am willing to stay here another, if by that means we may be able to reach a just and proper result in this trial." (73 Fed. 1, 183.)

[5]"In order to acquit the defendant of the seventeen charges submitted to you, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you shall find that he is guilty of any of them, you shall return a verdict of guilty." (73 Fed. 1, 183.)

v. Dunkel (2 Cir., 1949), 173 F. 2d 506 at 508, *supra,* stated:

> "A jury which felt itself coerced by such language would have lacked all independence of mind; it would have been no better than a sounding board for any judicial whisper."

Appellant relies heavily on *Peterson v. United States,* 213 Fed. 920 (9 Cir., 1914), as authority for his contention that the supplemental instruction constitutes coercion. The very same contention was made in the *Kawakita* case, *supra,* where this court at page 527 disposed of it as follows:

> "While there is language in *Peterson v. United States* (9 Cir., 1914), 213 Fed. 920, which seems to support the appellant, the import of the language there used is fully explained in our later expression in *Shea v. United States* (9 Cir., 1919), 260 Fed. 807, which reviews the Supreme Court decision more fully."

In *United States v. Commerford* (2 Cir., 1933), 64 F. 2d 28 at 31, in considering the cases of *Peterson v. United States,* 213 Fed. 920; *Stewart v. United States,* 300 Fed. 769, and *Burton v. United States,* 196 U. S. 283, all of which cases are relied upon by appellant herein, the court stated:

> "In *Burton v. United States,* 196 U. S. 283; *Burger v. United States,* 62 F. 2d 438 (10 Cir.); *Stewart v. United States,* 300 Fed. 769 (8 Cir.), and *Peterson v. United States,* 213 Fed. 920 (9 Cir.), reversals of convictions were based upon improper inquiries addressed to the foreman concerning the division of the jurors. They are not relevant here."

Appellant further cites in support of his contention: *Edwards v. United States,* 7 F. 2d 598 (8 Cir., 1925); *Quong Duck v. United States,* 239 Fed. 563 (9 Cir., 1923); *Demetree v. United States,* 207 F. 2d 892 (C. A. 5, 1953), and *Henry v. United States,* 204 F. 2d 817 (C. A. 6, 1953). None of these cases disproves the instruction given in this case.

In addition to the *Allen* instruction, the appellant contends that certain other statements by the court hereinbefore set forth had a tendency to coerce the jury.

The jury had been out about twenty-four hours; it was the week-end, and the court had just given the *"Allen"* instruction and counsel for the appellant had entered an exception to it on the ground that defendant is entitled to the independent opinion of each and every juror [R. Tr. 571]; the court then reiterated, "I don't want any juror to surrender his honest conviction under any circumstances" [R. Tr. 571], and then immediately followed the remarks which appellant says were coercion [R. Tr. 572]:

> "The Court: I don't want anybody to surrender their honest conviction under any circumstances but, however, that is your problem. I might say that I will be here until Noon and after that time I am going to return home. And I think counsel will also want to be on their way. They can assemble again in about an hour or so on notice. anytime between now and tomorrow evening.
>
> Mr. Bowler: That is right.

Mr. Ball: Well, your Honor, I am in this position—that no sacrifice of time will make any difference to me. I will be here at the disposal of my client no matter when it is, to properly defend him and see that he is properly defended.

The Court: Well, we are all in the same boat, gentlemen, counsel on both sides and the court. We are at the mercy of the jury."

Appellant has distorted the import of these remarks all out of proportion when he states in his opening brief, page 130, commencing on line 18: "They were reminded that if they did not agree within the hour, the court and counsel would be gone and the jury might be compelled to stay together over the week-end." The jury were simply informed that, being a week-end and court not being in regular session, for them not to fear; that the court would convene on their notice within an hour, and when the court further said, "We are all in the same boat, gentlemen, counsel on both sides and the court, we are at the mercy of the jury," it meant,—and one cannot reasonably infer anything different,—that even though it is a week-end and the court is not in regular session, counsel on both sides and the court are all subject to the jury's call and will convene on notice within the hour.

(d) The Sentence of the Trial Court on the Conspiracy Count Was Legal.

The jury failed to return a verdict on the substantive count of burglary [R. Tr. 573] but, assuming for the purpose of argument that the jury had returned a verdict of acquittal on that count, the result would be nothing

more than a possible inconsistency in the verdict which has been repeatedly held in this circuit to be not fatal.[6]

In *Macklin v. United States,* cited in footnote 6, *supra,* (9 Cir.) 79 F. 2d 756, 758, which quotes with approval *Seiden v. United States* (2 Cir.), 16 F. 2d 197, as follows:

> "We have held that when a jury convicts upon one count and acquits upon another, the conviction will stand though there is no rational way to reconcile the two conflicting conclusions."

In *United States v. Dewinsky* (D. C. N. J., 1941), 41 Fed. Supp. 149, the court, in ruling on a comparable situation, had this to say at page 155:

> "Nor is the verdict of guilty on the conspiracy counts as to defendants Quick and Snover inconsistent with the not guilty verdicts on the substantive counts.
>
> These two defendants were liable on the substantive counts, if at all, by reason of the 'aiding and abetting' statute, 18 U. S. C. A. 550. That statute was read to the jury and explained to them. *The jury might well have found, as it did, that while the evidence brought Quick and Snover into a crime looking to the doing of the subsequent acts, it was not sufficiently strong to establish their participation therein as aiders and abettors.* There is ample testimony to support

---

[6]*Morrissey v. United States* (9 Cir., 1933), 67 F. 2d 267; *Macklin v. United States* (9 Cir. 1935), 79 F. 2d 756, 758; *Maugeri v. United States* (9 Cir., 1935), 80 F. 2d 199, 201; *Long v. United States* (9 Cir., 1937), 90 F. 2d 482; *Suetter v. United States* (9 Cir., 1944), 140 F. 2d 103; *McElheny v. United States* (9 Cir., 1944), 146 F. 2d 932; *Bridgeman v. United States* (C. A. 9, 1950), 183 F. 2d 750, 753; *United States v. Coplon* (C. A. 9, 1950), 185 F. 2d 629, 633; *United States v. Catrino* (C. A. 9, 1949), 176 F. 2d 884, 888; *Robinson v. United States* (C. A. 9, 1949), 175 F. 2d 4, 9.

the conviction on the conspiracy count alone and it is not inconsistent with reasonable doubt as to the other counts." (Emphasis added.)

Since the jury found the appellant guilty of conspiracy to commit a felony, the sentence of the court was legal.

The three cases cited by appellant in support of his contention add nothing to the solution of the problem, in that they are concerned with general principles of law with which there is no controversy.

Conclusion.

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

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Chief Assistant U. S. Attorney,

JAMES R. DOOLEY,
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Attorneys for Appellee.

No. 14467

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Bradford Welch, Inc., a Corporation, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California

No. 40,012—In Bankruptcy

In the Matter of

BRADFORD WELCH, INC., a Corporation,
Bankrupt.

CERTIFICATE AND REPORT OF REFEREE ON PETITION FOR REVIEW OF REFEREE'S ORDER ON OBJECTION TO FEDERAL TAX CLAIM

To Honorable Michael J. Roche, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of the above-entitled court and the referee primarily in charge of the above-entitled proceeding in bankruptcy, hereby respectfully certify and report:

On December 4, 1953, the following petition for review was filed in the above-entitled bankruptcy proceeding:

"Comes now the United States of America, by and through its attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, Charles Elmer Collett, Assistant United States Attorney for said District, and Dan S. Morrison, Acting Associate Civil Advisory Counsel, Internal Revenue Service, and files this Petition for Review of

the Order of the Referee entered herein on or about October 29, 1953, directing that the claim filed on behalf of the United States by the Director of Internal Revenue for Federal insurance contributions taxes and withholding taxes due from the bankrupt in the amount of $2,192.64 be allowed as a priority claim in that amount, but be disallowed as a security claim, which Order reads as follows:

" 'Order, Judgment and Decree That Amended Tax Claim of the United States Be Allowed in Its Entirety as a Priority Claim and Disallowed as a Secured Claim

" 'Whereas, it appears from the record herein that the United States, through its duly authorized agent, the Collector of Internal Revenue for the First District of California, has filed, in the above-entitled bankruptcy proceeding, its amended claim for taxes in the aggregate sum of $2,192.64 of which said aggregate amount, the sum of $945.37 is purported to be secured by a lien under the provisions of Sections 3670-3672, said secured claim (so far as the averments in said tax claim are concerned) being based upon the language found in Paragraph 6 of said amended tax claim, i.e., "That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens, or liens as above set forth" and

" 'Whereas, it appears from the record herein that John O. England, as trustee of the bankruptcy

estate of the above-named bankrupt, has filed, in said bankruptcy proceeding, the following objections to said amended claim:

" ' "1. That said claim, to the extent of the sum of $945.37, evidenced by amended proof of debt filed as aforesaid, purports to be secured by a statutory lien upon the assets of said bankrupt estate under the provisions of Sections 3670-3672 of the Internal Revenue Code, but said claim is not secured by a good and valid lien in the sum of $945.37 or otherwise.

" ' "2. That it does not appear from said proof of debt when said lien was recorded or effective.

" ' "3. That your petitioner concedes that said claim in the total sum of $2,192.64 is a claim entitled to priority of payment with other priority claims for taxes on file herein by the State of California and the City and County of San Mateo, but alleges that it is not secured by any lien, statutory or otherwise, which would give the said claim any right to payment in advance of or prior to said priority tax claims of the said State, City or County.

" ' "Wherefore, your trustee prays that said proof of claim, as amended, be re-examined and following a hearing of the within objections an Order be made denying said claim a lien, statutory or otherwise, upon the assets of this bankrupt estate, and determining that said claim is a claim entitled to priority of payment under the provisions of Section 64(a) of the Bankruptcy Act." and

" 'Whereas, it appears from the record herein, and the court so finds, that the United States never has filed any notice of the aforesaid claimed statutory lien as provided in Section 3672 of the Internal Revenue Code, and

" 'Whereas, it appears from the record herein, and the court so finds, that, insofar as the rights of other creditors of the bankrupt, including any rights of the hereinbefore-mentioned State of California and the City and County of San Mateo, are concerned, the aforesaid trustee, as of the date of the filing of the initial petition in bankruptcy herein, became, and now is, vested with all the rights, remedies, and powers of a creditor then holding a lien on the assets of the bankrupt, and

" 'Whereas, the record herein shows, and the court so finds, that at no time did the United States have any lien whatsoever upon the assets of the bankrupt, or on any part thereof, as against the other creditors of the bankrupt, including the State of California and the City and County of San Mateo, and

" 'Whereas, the record herein shows, and the court so concludes, that the objection of said trustee that "said claim, to the extent of the sum of $945.37 * * * purports to be secured by a statutory lien upon the assets of said bankrupt estate under the provisions of Sections 3670-3672 of the Internal Revenue Code," is not secured by a good and/or valid lien in the sum of $945.37, or otherwise, and

" 'Whereas, the record herein shows, and the court

so concludes, that the aforesaid amended claim in the total sum of $2,192.64 is a claim entitled to priority of payment, with other priority claims for taxes on file herein, including the State of California and the City and County of San Mateo, but that no part of said $2,192.64 is secured by any lien, statutory or otherwise, which would, or does, give the United States any right to the payment of said amended claim, or any part thereof, in advance of, or prior to said priority tax claim of the aforesaid State, City and/or County of San Mateo, and

" 'Whereas, the record herein shows, that said amended claim having been re-examined at a hearing held for that purpose, as prayed for by said trustee, the court, after considering the briefs filed, on behalf of the United States, The State of California, and said trustee, and the entire record herein, concludes that (1) said amended claim of the United States should be Allowed as a priority claim in the aggregate sum of $2,192.64, and (2) that said claim be Disallowed, as a secured claim.

" 'It Accordingly So Is Ordered, Adjudged and Decreed.

" 'Dated: October 29th, 1953.

" 'BURTON J. WYMAN,
" 'Referee in Bankruptcy.'

"The petitioner alleges that the Referee in Bankruptcy erred in the following particulars in the making of said order of October 29, 1953:

"1. The Referee in Bankruptcy erred in failing

to find, hold and order that the claim of the United States filed in the above-entitled proceeding for federal insurance contributions and withholding taxes to the extent of $945.37, is secured by valid and existing Federal tax liens and entitled to the priority of payment accorded by sections 67b and 67c of the Bankruptcy Act as a lien claim.

"Petitioner requests that the Referee in Bankruptcy certify a record to the United States District Judge in this review consisting of the following papers in the file of the case:

"1. Referee's Findings of Fact and Conclusions of Law and Order on Objection to claim.

"2. A summary of the evidence material to the issue introduced at hearings held before the Referee.

"3. Copies of all exhibits introduced at such hearings.

"4. Stipulation dated November 5, 1953.

"5. This Petition.

"Dated: This 4th day of December, 1953.

"LLOYD H. BURKE,
"United States Attorney;

"By /s/ CHARLES ELMER COLLETT,
"Assistant U. S. Attorney.

"/s/ DAN S. MORRISON,
"Acting Associate Civil Advisory Counsel, Internal Revenue Service."

The circumstances, under which the filing of said petition for review came about, are as follows:

On August 22, 1952, a "First Amended Claim of United States for Taxes" was filed in the above-entitled bankruptcy proceeding. In substance, said amended claim sets forth:

"Glen T. Jamison, Collector of Internal Revenue for the First District of California, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

"1. That Bradford Welch, Inc., above named, is justly and truly indebted to the United States in the sum of $2,147.95, with interest thereon as hereinafter stated.

"2. That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax and Period	Assessment List	Amount of Tax	Total Assessment	Together With Int. at ½ of 1% Per Mo. On Total Assessment Until Paid. Int. Accrued from Date Below to July 23, 1951	
Taxes Secured By Statutory Lien Under Section 3670-3672 IRC					
Social Security F. I. C.					
12-31-49 (2-50-5468)	Tax	34.74			
	Interest	.17	34.91	2.89	3- 6-50
3-31-50 (5-50-9061-2)	Tax	75.97			
	Interest	.55	76.52	5.01	6-20-50
9-30-50 (11-50-217768)	Tax		51.93	1.92	12-11-50
Withholding Tax					
12-31-49 (2-50-360300)	Tax	146.60			
	Interest	1.10	147.70	11.89	3-20-50
3-31-50 (5-50-9061-2)	Tax	201.90			
	Interest	1.51	203.41	13.32	6-20-50
9-30-50 (11-50-217768)	Tax		108.38	4.01	12-11-50
Employment Withholding Tax					
12-31-50 (2-51-8278-2)	Tax	275.76			
	Interest	2.07	277.83	5.65	3-21-51
			$900.68	$44.69	
	1st sub total	$945.37			
				July 23, 1951	
Taxes Entitled to Priority Under Section 64(a) Bankruptcy Act					
3-31-50 (9-51-6111-1)	Tax	174.06			
	Interest to 7-23-51	12.81	186.87		
6-30-51 (9-51-6139-1)	Tax		376.66		
9-30-51 (8-52-6340)	Tax		683.74		
			$1,247.27		
	2nd sub total	$1,247.27			
	Grand Total	$2,192.64			

"3. The right to amend this claim at any time during the pendency of this bankruptcy proceeding is hereby reserved.

"4. That no part of said debt has been paid, but that the same is now due and payable at the office of the Collector of Internal Revenue at San Francisco, California.

"5. That there are no set-offs or counterclaims to said debt.

"6. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens, or liens as above set forth.

"7. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

"8. That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or the other person who fails to pay the claims of the United States in accordance with their priority."

On October 2, 1952, the following verified objections to said claim were filed in said bankruptcy proceeding.

"Now comes John O. England, Trustee in Bankruptcy of the estate of the above-named bankrupt, and objecting to the claim of the United States of America filed herein on its behalf by the Collector of Internal Revenue for the First District of California on August 22, 1952, in the sum of $2,192.64, as grounds of objection alleges:

"1. That said claim, to the extent of the sum of $945.37, evidenced by amended proof of debt filed as aforesaid, purports to be secured by a statutory lien upon the assets of said bankrupt estate under the provisions of Sections 3670-3672 of the Internal Revenue Code, but said claim is not secured by a good and valid lien in the sum of $945.37 or otherwise.

"2. That it does not appear from said proof of debt when said lien was recorded or effective.

"3. That your petitioner concedes that said claim in the total sum of $2,192.64 is a claim entitled to priority of payment with other priority claims for taxes on file herein by the State of California and the City and County of San Mateo, but alleges that it is not secured by any lien, statutory of otherwise, which would give the said claim any right to payment in advance of or prior to said priority tax claims of the said State, City or County.

"Wherefore, your trustee prays that said proof of claim, as amended, be re-examined and following a hearing of the within objections an Order be made denying said claim a lien, statutory or otherwise, upon the assets of this bankrupt estate, and determining that said claim is a claim entitled to priority of payment under the provisions of Section 64(a) of the Bankruptcy Act.

"/s/ JOHN O. ENGLAND,
"Trustee.

"STANLEY M. McLEOD,
"Attorney for Trustee."

[Verification omitted for sake of brevity.]

On October 22, 1952, a hearing on said amended claim and said objections was had before the undersigned referee in bankruptcy, at which time the following occurred:

"The Referee: Matter of Bradford Welch, Inc.

"Mr. McLeod: That is ready. I don't know just how we should proceed here. But, your Honor will recall that the trustee filed his First and Final Account herein on July 23rd. At that time, the Collector's Office orally informed us they asserted a statutory lien, although the proof of claim which they filed, I think sometime in May, for $1592.00 and some odd cents, did not indicate on its face that there was such a lien.

"The Referee: Well, they have a blanket clause in there, haven't they?

"Mr. Anderson: Yes. For the record, that is Clause No. 6, which says:

> " 'That the United States does not hold, nor has any person by its order, or to Deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens, or liens as above set forth.'

"Mr. McLeod: But, as I say, there were no liens above set forth. So, your Honor continued it to this date, and, I think, gave permission to amend the proof of claim, and just to make the matter more interesting, I filed objections after the amended claim was filed. Some are rather general, but some I should like to advance.

"The Referee: When did you file them, Mr. McLeod?

"Mr. McLeod: When did I file them?

"The Referee: Yes.

"Mr. McLeod: October 2nd. The notice of the hearing was filed a little bit later.

"The Referee: I will get it in here.

"Mr. McLeod: One objection I raised was that it does not appear from the amended proof when the lien was either assessed, reported, or effected. I think the date should be set out for the benefit of the trustee and the Court, to determine whether the assessment was made prior to the bankruptcy or afterward. I believe there is some authority that the Government may make a final assessment even after bankruptcy proceedings are instituted.

"The Referee: They may perfect a lien after bankruptcy.

"Mr. McLeod: They may perfect a lien after bankruptcy, that is what I mean, if the assessment has been made before that.

"The Referee: The assessment, I think, would have to be made before.

"Mr. McLeod: Can you tell us?

"Mr. Anderson: That is right, your Honor, and with respect to notice of the date of assessment, on the face of the claim, there is in the Government's hieroglyphics, the matter in parentheses, and the first number refers to the month; the second to the year. In other words, 2-50 means February, 1950. That is the only indication on the face of the claim as to when the assessment was made.

"The Referee: Don't you think that some day someone is going to object to the hieroglyphics?

"Mr. Anderson: They have, your Honor. I was reading a case in which that occurred. There, no reference had been made in the proof of claim that we held statutory liens, but the District Court on review of the Referee's decision allowing our claim, the District Court upheld that and based it on the fact that the words 'statutory lien' were in the claim itself and that was sufficient to put the trustee on notice. The situation I refer to arises in a West Virginia decision of April 15, 1952, In re Mannington Pottery Co. The only citation I have is Prentiss Hall Tax Service, Paragraph 72, Page 584.

"The Referee: I will look into that. Personally my own view is that is not sufficient in the face of

objections. Of course, you can get by with it if there is no objection.

"Mr. Anderson: I wondered, your Honor, in view of the objections having been made, if I might make an offer in evidence of the certificates to show the actual dates the assessments were made and received here?

"The Referee: Were they filed in time?

"Mr. Anderson: No question about that.

"The Referee: They are very careful about that, because I have one now I am working on.

"Mr. Anderson: In which we did not do that.

"The Referee: I don't know whether they are right or wrong. I am just working on it.

"Mr. McLeod: I won't object to the introduction of such evidence.

"Mr. Anderson: On behalf of the Collector, then, your Honor, I should like to introduce in evidence the Certificate of Assessments and Payments which cover the taxes in the proof of claim under the heading, 'Taxes secured by statutory lien under Sec. 3670-3672 Internal Revenue Code.' These certificates show the dates the assessment were made, the dates the assessments were received and notice and demand was made upon the taxpayer with respect to those respective taxes.

"The Referee: Respondent's Exhibit No. 1.

"(Three Certificates of Assessments and Payments were admitted in evidence as Respondent's Exhibit No. 1.)

"Mr. Anderson: I might add that no Notice of

Lien was filed with the Office of the County Recorder, so far as I know, on these taxes.

"The Referee: Did these affect personal property or real property?

"Mr. Anderson: As I recall, there was only personal property in the estate.

"Mr. McLeod: That is all, and some of the personal property was proceeds of accounts receivable. Whether or not they were in existence is questionable, in my mind. All of the assets of the estate consisted of personal property, the major item being stock in trade and the balance, certain accounts receivable, and some fixtures of no value.

"Mr. Anderson: For the record, your Honor, I will stipulate to that statement, so the record is clear as to the type of property. I might point out with respect to the creation of accounts receivable, that the Federal tax lien does attach to after-acquired property. The Glass City Bank case, decided by the Supreme Court——

"The Referee: I remember that case.

"Mr. Anderson: I think we have good authority there. Some others may be a little shaky.

"But, the position of the Government, your Honor, is simply this: That under these circumstances, where there is no other creditor that is involved that has the status of a judgment creditor—and we claim the trustee in bankruptcy is not a judgment creditor within the meaning of Sec. 3672 of the Code—we take the position that our lien is created at the time the assessment list is received in California and is perfected by giving notice and

demand to the taxpayer. That lien, then, is good as to all parties, except, as I say, judgment creditors.

"The Referee: Well, hasn't the Ninth Circuit really ruled that the trustee is a judgment creditor? Not in a tax matter, though.

"Mr. Anderson: Not that I am aware of. It might have arisen.

"The Referee: Haven't they held that with reference to homesteads? I am not sure whether they held it outright on that or not, but they went awfully close to it if they did not.

"Mr. Anderson: Well, I don't believe they have, Judge, on the question with respect to the interpretation of Sec. 3672.

"The Referee: The only way you might get around that, you say it was a bankruptcy case, and they have gone around the Revenue sections in bankruptcy cases, for instance, on priority.

"Mr. Anderson: Yes.

"The Referee: So, you are bound by the priority there and not any outside Revenue law.

"Mr. Anderson: I have at least one case concerning the status of a trustee in bankruptcy. That was not a Ninth Circuit case, unfortunately. It was in the Sixth Circuit, Taylorcraft Aviation Corp., Sixth Circuit. 1948; 168 Fed. (2") 808. That case discusses the problem of whether or not the trustee is a judgment creditor within the meaning of Sec. 3672 and concludes that he is not. That is our authority for taking the position I am today. I then believe that if the Court should follow that argument and find we do have a valid lien which arose and was com-

pleted prior to the filing of the petition, I don't know whether we can raise the point whether that is valid in bankruptcy. I believe it is. I have authorities I would like to cite, if that is the issue before the Court.

"The Referee: How about that, Mr. McLeod?

"Mr. McLeod: I am inclined to agree that if it is a valid statutory lien, that the Bankruptcy Act must recognize it.

"Mr. Anderson: Even with respect to personal property, under Sec. 67c, we would be subordinate, and I concede we are subordinate to costs of administration and labor claims.

"Mr. McLeod: Yes.

"Mr. Anderson: The only possible advantage we could have would be over the State of California and the County of San Mateo.

"The Referee: They having no liens.

"Mr. McLeod: They have no liens, though I did give a couple of promises to them——

"The Referee: Has the State of California been notified on this?

"Mr. Anderson: I don't believe so. I raised this by objecting to the trustee's Final Account.

"Mr. McLeod: No one was present.

"The Referee: The only thing is, I don't want to put the trustee in the position of having trouble with the State of California afterwards.

"Mr. McLeod: Well, I think that would be covered—well, I don't know that it would either—but, I would refer to Sec. 67c.

"The Referee: 67?

"Mr. McLeod: 67c sub-paragraph (2), where it says:

> " 'Though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property, not accompanied by possession of such property——'

shall not be valid against the trustee.

"The Referee: My first thought is that you should clear that up between the wording of the two sections, why they have got one section that is practically positive and another that qualifies it so.

"Mr. McLeod: Really, I don't know what they mean. I have studied both of those sections.

"Mr. Anderson: I have no trouble that way. The Bureau pretty well decides what it means so far as I am concerned. Mr. Lafferty and I have argued that at some length before another court, and I believe he had the same sort of case before you with Mr. Stokes.

"The Referee: I have one now. I believe the briefs cover that point. Maybe I will have to decide that other case before I decide this. The only thing is, has the State filed in this?

"Mr. McLeod: Yes, I think the Department of Employment has a claim and the Board of Equalization; the County of San Mateo, the Franchise Tax Board, and the City of San Mateo. We have all those in priority claims along with the Collector.

"The Referee: Let's see now. They are claiming priority. You are claiming under a lien, aren't you?

"Mr. Anderson: Yes.

"The Referee: And claiming, to the extent of your lien, that you have a secured claim and had it at the time of the filing of the petition. Now, would they have any right? Do they have one of those blanket provisions in one of their claims?

"Mr. Anderson: If they have reduced their claim to a lien before your Honor—I don't want to be in the position of arguing their case—I think they have the status of a judgment creditor, when they have taken action to reduce their claim to a lien.

"The Referee: I had quite a conference with Mr. Lafferty. I have been trying to get them to change the form of their claim. Yours is of a type different from theirs. But, they state right out they claim under Section 64 of the Bankruptcy Act and throw in the lien proposition.

"Mr. Anderson: Something like our amended claim that was drawn under your instructions here.

"The Referee: Yes. And if you had seen their claim, you would not have to worry about them.

"Mr. McLeod: No. I think the trustee will be protected in any condition that arises from other tax agencies. I don't see how they could come in and say he has been remiss or at fault.

"The Referee: As long as you are in the position of a judgment creditor, then you would represent all the creditors, wouldn't you?

"Mr. McLeod: Yes.

"The Referee: Then, it would be a question of whether taxes with a lien or taxes without a lien, but subject to the rights of the trustee, would have any right to contest it with the Government.

"Mr. McLeod: As I say, the money, the amount in this, it just happens in this estate, does not amount to very much, because, if the United States were reduced to merely a priority status, not a secured status, you would pick up almost all, except for the amended claim.

"The Referee: Why not compromise the matter?

"Mr. McLeod: I mentioned that to Mr. Anderson earlier.

"The Referee: Can't you do it without getting a ruling in the matter? I have one in the Davanis matter.

"Mr. Anderson: I would like to ask you for a ruling here. The question of appeal can be decided by the Attorney General on the basis of the amount involved. This does not seem to me to be a case that would be appealed in view of the amount. That is just my guess, but we have had situations like this arising in the past right along, where we have claimed a lien but no weight was given to it by the trustee. That being so, when I had this opportunity that I saw coming up, I did want to raise it so a ruling would be made in this court as to whether or not we should amend our claim to set forth we had priority or not. That is why, if I could, I ask this Court to rule upon the matter for our guidance in the Collector's Office and we can govern ourselves accordingly, and there may come a time when we

will want to carry the substantive question up on appeal. That would be worthwhile to all parties concerned for the present, because of the doubts I realize are in your mind. I would like a ruling on whether or not we have a lien.

"The Referee: Haven't you got that covered in the Davanis matter, in which you will probably take a review if it is against you and they will probably take a review if it is in your favor?

"Mr. Anderson: I don't think so, your Honor. I believe that claim you have before you is one where we failed to file in time and defective on that basis, you see. I think our postion there would be that the filing of a claim which is null and void cannot serve to stop us from asserting our lien. I think that is a different situation there. That is not true here.

"The Referee: Of course, off-hand, I will say to you, Mr. Anderson, I don't think, if you file a claim in the court and that claim does not meet the requirements, and you have come in under a petition to intervene, you practically set up a different situation; that is, if your petition comes after the date for filing claims. That is my off-hand opinion. I have not decided that yet, because I have not gone into that angle.

"Well, if you want to rest on this one case, I will let you gentlemen brief it.

"Mr. Anderson: All right.

"The Referee: If you think this is a case where you can get a ruling squarely on that point.

"Mr. Anderson: I think, really, there are two points here:

"One: Whether or not the form of the claim is correct;

"Number 2: Whether we have a claim assertable against other priority creditors.

"The Referee: That would raise the question of the trustee's position.

"Mr. Anderson: The trustee being a judgment creditor. Now, that is another point I don't believe has been decided in the Ninth Circuit to my knowledge.

"The Referee: Well, how many days do you want, if you are the trouble maker here? Aren't you?

"Mr. Anderson: All right.

"The Referee: Have you made a pretty good research on it already?

"Mr. Anderson: Would you like to bring the City and County and State in on this? I know Mr. Lafferty is interested in this problem.

"The Referee: Why not do that? I think you could just do it by correspondence, to see if they are interested.

"Mr. McLeod: Yes. I will notify them on the basis of the argument.

"The Referee: Suppose you get up a joint letter and send it to them? And, then, suppose I give you 20 days, you 20, and you 10?

"Mr. Anderson: All right.

"The Referee: That will give you time to get your letter out and get in the brief. If anybody gets

stuck, come in and let me know. It will probably be some time. I don't believe in deciding these things without looking into them. There are numerous problems involved. Every time I get in one, it does not stop with what appears on the surface. It may be the trouble is in my mind. What looks like a simple matter, when I get into it, gets complicated. Maybe I am over careful.

"All right. Submitted that way. But, I think you better send a letter to Mr. Lafferty, and I think he is the only one you need to notify.

"(Submitted: 20-20-10.)"

After the briefs had been filed and considered by the undersigned referee in bankruptcy, the order complained of and set forth in the aforesaid petition for review was signed and caused to be filed by the undersigned referee in bankruptcy.

Papers Handed Up Herewith

Handed up herewith, as parts of this certificate and report, are the following papers:

1. The aforesaid "1st Amended Claim."

2. The aforesaid "Objections."

3. The aforesaid "Order, Judgment and Decree," etc.

4. The aforesaid "Petition for Review," etc.

5. "Trustee's Opening Brief."

6. "Opening Brief for the State of California."

7. "Memorandum on Behalf of Collector of Internal Revenue."

8. "Trustee's Closing Brief."

9. Letter, dated December 9, 1952, from Office of Attorney General.

10. Reporter's Transcript, of October 22, 1952, filed February 18, 1954.

11. Envelope Containing Exhibit.

Dated: March 11th, 1954.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed March 11, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 40,012—In Bankruptcy

In the Matter of

BRADFORD WELCH, INC., a Corporation,

Bankrupt.

ORDER CONFIRMING ORDER OF REFEREE

It Is Ordered that the order of the Referee in Bankruptcy entered in the above-entitled cause on October 29, 1953, granting the amended tax claim of the United States in its entirety as a priority claim and disallowing it as a secured claim, be and the same hereby is Confirmed.

Dated: May 25th, 1954.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice is hereby given that the United States of America, claimant in the above-entitled bankruptcy proceeding, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California, Southern Division, dated May 25, 1954, in the above-entitled proceeding confirming the Order of the Referee in Bankruptcy entered October 29, 1953, granting the amended tax claim of the United States in its entirety as a priority claim and disallowing it as a secured claim.

LLOYD H. BURKE,
United States Attorney.

By /s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibit, listed below, are the

originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

First amended claim.

Objections of trustee to claim of United States of America.

Petition for review of referee's order on objection to federal tax claim.

Order, Judgment and decree that amended tax claim of the United States be allowed in its entirety as a priority claim and disallowed as a secured claim.

Order confirming order of referee.

Notice of Appeal.

Designation of record on appeal.

Respondent U. S. exhibit No. 1.

Reporter's transcript of hearing of Oct. 22, 1952.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 2nd day of August, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,467. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. John O. England, Trustee in Bankruptcy of the Estate of Bradford Welch, Inc., a corporation, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 2, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,467

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of ESTATE OF BRADFORD WELCH, INC., a Corporation, Bankrupt,
Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 17, paragraph 6, of the Rules of Practice of this Court, Appellant hereby files the following Statement of Points and Designation of Record on Appeal:

I.

Appellant hereby adopts the Designation of Record on Appeal hereto filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, as his Designation of the Record on Appeal in this Court.

II.

Appellant intends to rely on the following points in this proceeding:

1. The federal tax lien created by sections 3670-3672 of the Internal Revenue Code (Title 28 U.S.C.) is valid from the date the assessment list is received

by the Collector or Director of Internal Revenue as to all persons other than a "mortgagee, pledgee, purchaser, or judgment creditor" without filing a notice of tax lien.

2. A trustee in bankruptcy is not a "judgment creditor" within the meaning of section 3672, supra, by virtue of section 70(c) of the Bankruptcy Act, which confers on the trustee as of the date of bankruptcy "all the rights, remedies and powers of a creditor then holding a lien."

3. Since the tax liens in this proceeding arose prior to the date of bankruptcy, the claim of the United States constitutes a preferred claim under section 67(c) of the Bankruptcy Act, rather than a mere priority claim under section 64 of the Bankruptcy Act.

LLOYD H. BURKE,
United States Attorney.

By /s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

/s/ DAN S. MORRISON,
Attorney, Office of the Regional Counsel, Internal Revenue Service.

[Endorsed]: Filed August 10, 1954.

No. 14,467

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Bradford Welch, Inc., a Corporation, Bankrupt,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

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No. 14,467

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Bradford Welch, Inc., a Corporation, Bankrupt, *Appellee.*	

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The District Court did not make findings of fact or render an opinion, it merely entered an order confirming the order of the referee in bankruptcy (R. 31) and that order, dated May 25, 1954, is not reported.

JURISDICTION.

Bradford Welch, Inc., was adjudicated a bankrupt in the United States District Court for the Northern District of California, Southern Division, on July

23, 1951.[1] The Collector of Internal Revenue for the First Collection District of California filed a claim in bankruptcy against Bradford Welch, Inc., for withholding and insurance contributions taxes and interest thereon on April 28, 1952. (R. 27-29.) Later, on August 22, 1952, the Collector of Internal Revenue filed an amended claim for taxes and interest due and owing the United States by Bradford Welch, Inc. (R. 12.) The referee in bankruptcy entered an order on or about October 29, 1953, directing that the claim filed on behalf of the United States for taxes and interest due and owing from the bankrupt in the amount of $2,192.64 be allowed in its entirety as a priority claim and disallowing any part thereof as a secured claim under Section 67 of the Bankruptcy Act. (R. 4-7.) A petition for review of the referee's order was filed on behalf of the United States by the Collector of Internal Revenue in the United States District Court for the Northern District of California, Southern Division, on December 4, 1953. (R. 3-8.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1334. The District Court entered an order confirming the order of the referee in bankruptcy on May 25, 1954. (R. 31.) Within thirty days and on June 24, 1954, notice of appeal was filed. (R. 32.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

---

[1]It is undisputed that Bradford Welch, Inc., was adjudicated a bankrupt on July 23, 1951. However, the only indication in the record that that was the date appears on page 10 where the date July 23, 1951, acts as a dividing line when interest ceased on the taxes due and owing the Government.

QUESTION PRESENTED.

Whether the District Court erred in confirming the order of the referee in bankruptcy disallowing the claim of the Government that it had valid liens for unpaid taxes and interest in the amount of $945.37 upon the assets of Bradford Welch, Inc., bankrupt, which were entitled to the priority of payment prescribed by Section 67 of the Bankruptcy Act.

STATUTES INVOLVED.

The applicable provisions of the statutes involved are set forth in the Appendix, *infra.*

STATEMENT.

The pertinent facts in this case are as follows:

On July 23, 1951, Bradford Welch, Inc., was adjudicated a bankrupt by the District Court, and John O. England was appointed trustee in bankruptcy of the estate of Bradford Welch, Inc. (R. 4-5, 10.) On April 28, 1952, the Collector of Internal Revenue for the First Collection District of California filed a claim with the trustee in bankruptcy for withholding and insurance contributions taxes and interest thereon due and owing the United States by the bankrupt. (R. 27-29.) Later, on August 22, 1952, the Collector filed a "First Amended Claim of United States for Taxes" with the trustee in bankruptcy claiming that there was $2,192.64 in taxes and interest due and owing the

United States by the bankrupt. The Collector claimed that $945.37 of that amount was secured by liens on the assets of Bradford Welch, Inc., which arose under the provisions of Sections 3670 and 3671 of the Internal Revenue Code of 1939 before it was adjudicated a bankrupt. (R. 4-9.)

The trustee in bankruptcy filed objections to the claim of the United States. On October 22, 1952, a hearing was held before a referee in bankruptcy on the amended claim of the United States and the objections raised thereto by the trustee in bankruptcy. (R. 13.) Counsel for the trustee in bankruptcy said that one of the objections raised to the amended proof of the Government's claim was that it did not appear from it when "the lien was either assessed, reported, or effected." (R. 14.) Following a discussion between counsel and the referee in bankruptcy as to the quantum of proof necessary for the Government to establish that it had a lien upon the assets of the bankrupt, counsel for the Government asked permission to be allowed to introduce in evidence "Certificates of Assessments and Payments" (Treasury Form 899) to show the dates the assessment lists were received by the Collector, and the dates on which notice and demand were duly made upon Bradford Welch, Inc. After counsel for the trustee in bankruptcy said that "I won't object to the introduction of such evidence," the Certificates of Assessments and Payments were admitted in evidence. (R. 16, 27-29; Ex. 1.) Counsel for the Government volunteered that

insofar as he knew no notice of lien had been filed with the office of the County Recorder. (R. 16-17.)

It was stipulated between counsel that the only property in the estate of the bankrupt was personal property. (R. 17.)

On October 29, 1953, the referee in bankruptcy entered an order directing that the claim of the United States be allowed in its entirety as a priority claim and disallowing any part thereof as a secured claim. The referee in bankruptcy found that "the United States never has filed any notice of the aforesaid claimed statutory lien as provided in Section 3672 of the Internal Revenue Code." The referee also found that the trustee in bankruptcy was "vested with all the rights, remedies, and powers of a creditor then holding a lien on the assets of the bankrupt," and that "at no time did the United States have any lien whatsoever upon the assets of the bankrupt, or on any part thereof, as against the other creditors of the bankrupt, including the State of California and the City and County of San Mateo." (R. 4-7.)

On May 25, 1954, the District Court entered an order affirming the order of the referee in bankruptcy granting the amended tax claim of the United States in its entirety as a priority claim and disallowing any part thereof as a secured claim. (R. 31.)

STATEMENT OF POINTS TO BE URGED.

1. The Government introduced proof sufficient to establish that it had valid liens for unpaid taxes and interest in the amount of $945.37 which arose upon the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt.

2. The federal liens for the unpaid taxes and interest are valid and though subordinate to items which come under subsections (1) and (2) of Section 64 a, are entitled to the priority of payment as prescribed by Section 67 of the Bankruptcy Act.

SUMMARY OF ARGUMENT.

The District Court erred in confirming the order of the referee in bankruptcy disallowing the claim of the Government that it had valid liens for unpaid taxes and interest in the amount of $945.37 upon the assets of Bradford Welch, Inc., bankrupt, which were entitled to the priority of payment prescribed by Section 67 of the Bankruptcy Act. The Government introduced evidence sufficient to prove that it held liens for unpaid taxes upon the assets of Bradford Welch, Inc., which arose before it was adjudicated a bankrupt and those liens were valid as against the trustee in bankruptcy.

Sections 3670 and 3671 of the Internal Revenue Code of 1939 provide that a lien for unpaid taxes arises upon all the property belonging to the delinquent taxpayer after demand and at the time the

assessment list is received by the Collector. Such liens are general and perfected liens. The certificates of assessments and payments introduced into evidence by the Government showed that liens for unpaid taxes and interest in the amount of $945.37 arose upon the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt. While the certificates may not have been the best evidence, they were admitted with the express approval of counsel for the trustee in bankruptcy for that very purpose and therefore must be considered.

The liens were valid against the trustee in bankruptcy entitling them to the priority of payment prescribed by Section 67 of the Bankruptcy Act. The fact they were unrecorded and the Government did not have possession of any of the assets of the bankrupt, which consisted entirely of personal property, merely served to postpone them in the order of payment to the debts specified in clauses (1) and (2) of Section 64 a of the Bankruptcy Act. It did not serve to render them invalid as against the trustee in bankruptcy. It is well settled that unrecorded tax liens are valid against all persons except those classes of persons specifically enumerated in Section 3672 of the Internal Revenue Code of 1939, that is, "any mortgagee, pledgee, purchaser, or judgment creditor." In *United States v. Gilbert Associates,* 345 U.S. 361, 364, the Supreme Court said that "Congress used the words 'judgment creditor' in §3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts." While Section 70 c of the

Bankruptcy Act provides that as to all property in the possession of the bankrupt the trustee in bankruptcy shall be considered a lien creditor and as to all other property a judgment creditor, it does not serve to make him a judgment creditor in the ordinary, usual or conventional sense as required under Section 3672 of the Code. Accordingly, unrecorded liens for taxes are valid as against the trustee in bankruptcy and entitled to the priority of payment prescribed by Section 67 of the Bankruptcy Act.

ARGUMENT.

THE GOVERNMENT HAD LIENS FOR UNPAID TAXES AND INTEREST IN THE AMOUNT OF $945.37 UPON THE ASSETS OF BRADFORD WELCH, INC., BANKRUPT, WHICH WERE ENTITLED TO THE PRIORITY OF PAYMENT PRESCRIBED BY SECTION 67 OF THE BANKRUPTCY ACT.

The referee in bankruptcy entered an order directing that the claim of the United States for taxes and interest thereon in the amount of $2,192.64 be allowed in its entirety as a priority claim and disallowing any part thereof as a secured claim. The District Court, without making findings of fact or rendering an opinion, entered an order confirming the order of the referee in bankruptcy. For the reasons hereinafter stated, we submit that the order of the District Court confirming the order of the referee in bankruptcy should be reversed to the extent that it disallowed the claim of the Government that it had valid liens for unpaid taxes and interest in the amount of $945.37 upon the assets of Bradford Welch, Inc., bankrupt,

which were entitled to the priority of payment prescribed by Section 67 c of the Bankruptcy Act. (Appendix, *infra.*)

In the absence of findings of fact or an opinion by the District Court we are forced to resort to an examination of the order of the referee in bankruptcy to determine the basis for the holding that the Government did not have a secured claim for taxes under Section 67 of the Bankruptcy Act. As we interpret the order of the referee in bankruptcy, it is impossible to determine the exact theory upon which he decided that the Government did not have such a claim. We submit that it is subject of two possible interpretations: (1) that the Government failed to introduce sufficient proof to establish that liens for unpaid taxes arose under Sections 3670 and 3671 of the Internal Revenue Code of 1939 (Appendix, *infra*) upon the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt, or (2) that the unrecorded tax liens of the Government were invalid because under Section 70 c of the Bankruptcy Act (Appendix, *infra*), the trustee stands as a judgment creditor. We respectfully submit that the Government introduced sufficient evidence to prove that it held liens for unpaid taxes in the amount of $945.37 which arose upon the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt and that those liens were valid as against the other creditors of the bankrupt.

A. The Government introduced evidence sufficient to prove that it had valid liens for unpaid taxes in the amount of $945.37 which arose upon the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt.

Section 3670 of the Code provides that if any person refused to pay any tax after demand the same "shall be a lien in favor of the United States upon all property and rights in property, whether real or personal, belonging to such person." Under Section 3671 of the Code, the lien arises at the time the assessment list is received by the Collector, unless another date is fixed by law, and continues until the liability is satisfied or becomes unenforceable by lapse of time. Such liens are general and perfected liens. *United States v. New Britain,* 347 U.S. 81, 84. When a lien for federal taxes arises the Government acquires an interest in the property which in effect then has two owners. See *United States v. City of Greenville,* 118 F. 2d 963 (C.A. 4th).

In the instant case, the Collector filed a "First Amended Claim of United States for Taxes" claiming, among other things, that the Government had liens for taxes on the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt. (R. 9.) The trustee in bankruptcy filed objections to this claim and a hearing was held thereon before a referee in bankruptcy. (R. 13-14.) Counsel for the trustee made the statement (R. 14) that "it does not appear from the amended proof when the lien was either assessed, reported, or effected." A discussion ensued between counsel and the trustee in bankruptcy as to the quantum of proof that is necessary for the Govern-

ment to establish that it has a lien upon the assets of the bankrupt. (R. 15-16.) Afterwards, counsel for the Government said that in view of the objections that had been made he would like to offer in evidence the "Certificates of Assessments and Payments" to show the actual dates the assessments were made and received by the Collector. (R. 16.) Counsel for the trustee replied saying "I won't object to the introduction of such evidence." (R. 16.) Counsel for the Government then said (R. 16):

> On behalf of the Collector, then, your Honor, I should like to introduce in evidence the Certificate of Assessments and Payments which cover the taxes in the proof of claim under the heading, "Taxes secured by statutory lien under Sec. 3670-3672 Internal Revenue Code." These certificates show the dates the assessments were made, the date the assessments were received and notice and demand was made upon the taxpayer with respect to those respective taxes.

Three certificates of assessments and payments were admitted in evidence. (R. 16, 27-29; Ex. 1.) Counsel for the Government volunteered that insofar as he knew no notice of lien had been filed with the office of the County Recorder. (R. 16-17.)

The certificates of assessments and payments show that liens for taxes in the amount of $945.37 arose upon the assets of Bradford Welch, Inc., before it was adjudicated a bankrupt. That was the avowed purpose for which they were introduced in evidence. We submit that they constituted sufficient evidence to estab-

lish that the Government had such liens. See *United States v. Ettelson,* 159 F. 2d 193, 195 (C.A. 7th), and the cases cited therein. While the certificates may not have been the best evidence, they were admitted with the express approval of counsel for the trustee in bankruptcy, rather than over his objection, and therefore must be considered for what they show.

B. The liens were valid and entitled to the priority of payment prescribed by Section 67 of the Bankruptcy Act.

Section 64 of the Bankruptcy Act (Appendix, *infra*) sets forth the order in which unsecured debts are to be paid. Insofar as unsecured claims for taxes of the United States or any state or subdivision thereof, they are subordinated to the payment of administration and small wage claims and given what is commonly referred to as a fourth class priority. Section 64 of the Bankruptcy Act has no application to claims for federal or other taxes which are secured by liens. Section 67 of the Bankruptcy Act deals expressly with liens. Subsection a of Section 67 deals with void liens and subsection b deals with valid liens including "statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State." With regard to valid liens, subsection b provides that these may be valid against the trustee even though arising and perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy. Subsection c of Section 67 provides that statutory liens, including liens for taxes or debts owing to the United States or to any

state or any subdivision thereof, on personal property not accompanied by possession of such property shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of Section 64, which are small wage claims and certain administration expenses.

This Court had occasion recently to consider the effect that subsection c of Section 67 has upon subsection b of Section 67 in *California State Dept. of Employ. v. United States,* 210 F. 2d 242. In that case the Court said that Section 67 c does not affect or impair the priorities of liens recognized by Section 67 b and that Section 67 c "deals only with the relationship of the lienholder without possession to *unsecured* creditors having priorities under §64, sub. a." The Court concluded (p. 244):

> Thus we see that statutory liens unaccompanied by possession of the personal property to which they attach are postponed in payment only to the two claims specifically mentioned, viz. wages and expenses of administration.

Counsel stipulated that there was only personal property in the estate of Bradford Welch, Inc., bankrupt. (R. 17.) In the absence of possession by the Government of any of the bankrupt's property, we concede that under Section 67 c of the Bankruptcy Act the liens of the Government for unpaid taxes are required to be postponed in order of payment to the debts specified in clauses (1) and (2) of Section 64 a. We contend, however, that the liens in question were secured claims under Section 67 b and entitled to

priority of payment over the unsecured claims for taxes of the State of California or any subdivision thereof.

Unquestionably liens for taxes created under Sections 3670 and 3671 of the Internal Revenue Code of 1939 are applicable in bankruptcy. Indeed, this Court recognized that fact in *California State Dept. of Employ. v. United States, supra,* and *United States v. Heffron,* 158 F. 2d 657. See also *Goggin v. California Labor Div.,* 336 U.S. 118, 126. In the *California State Dept. of Employ.* case the Court said (p. 243):

> Section 67, sub. b of the Bankruptcy Act expressly provides that liens for taxes owed to the United States or any state are valid against the trustee. 11 U.S.C.A. §107, sub b. Section 67, sub. b places federal and state liens in the same category. The rank and position of such liens is determined by applicable lien law.

As we previously indicated, it is possible that the referee in bankruptcy's disallowance of the claim of the Government that it held liens for unpaid taxes and interest in the amount of $945.37 upon the assets of Bradford Welch, Inc., bankrupt, which were entitled to the priority of payment prescribed by Section 67 b and c of the Bankruptcy Act was premised upon an erroneous interpretation of Section 3672 of the Internal Revenue Code of 1939. (Appendix, *infra.*) Section 3672 provides that tax liens "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been

filed by the collector." It is plain that a trustee in bankruptcy does not come within any of the classes of persons enumerated in Section 3672.

Liens created under Sections 3670 and 3671 of the Code are, we repeat, general and perfect liens. If unrecorded they are valid against all persons with the exception of those classes of persons specifically enumerated by Section 3672 of the Code, that is, mortgagees, pledgees, purchasers, and judgment creditors. See *United States v. New Britain, supra; United States v. Gilbert Associates,* 345 U.S. 361; *United States v. Security Tr. & Sav. Bk.,* 340 U.S. 47.

The Supreme Court had cause to consider the meaning of the words "judgment creditor" as used in Section 3672 in *United States v. Gilbert Associates, supra.* That case involved the question of whether the Town of Walpole, New Hampshire, or the Federal Government had prior right to a fund in the hands of a state court receiver of the bankrupt corporation. The New Hampshire Supreme Court had held that tax assessments were in the "nature of a judgment" under the law of New Hampshire and that after the Town had made an assessment for taxes it was a judgment creditor within the meaning of Section 3672. Reversing the New Hampshire Supreme Court, the Supreme Court of the United States said (p. 364) that "Congress used the word 'judgment creditor' in §3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts." See also Justice Jackson's concurring opinion in *United States v. Security Tr. & Sav. Bk., supra.* And,

as the Supreme Court just recently said in *United States v. New Britain, supra* (p. 88):

> There is nothing in the language of §3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.

Traditionally, a judgment is a determination or adjudication made by a Court. (3 Blackstone Commentaries 365.) Under that definition, a judgment creditor is one in whose favor an obligation or debt is created by a decision or verdict of a Court.

Section 70 c of the Bankruptcy Act provides that a trustee in bankruptcy shall be a lien creditor as to all property in his possession and as to all other property a judgment creditor.[2] Neither serves to make him a judgment creditor within the ordinary, usual or conventional sense. It necessarily follows, therefore, that under the rationale of the Supreme Court's decisions in *United States v. Gilbert Associates, supra,* and *United States v. Security Tr. & Sav. Bk., supra,* a trustee in bankruptcy is not a judgment creditor nor a mortgagee, pledgee, or purchaser within the meanings of the words as they are used in Code Section 3672.[3]

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[2]A 1952 amendment of Section 70 c of the Bankruptcy Act (Act of July 7, 1952, c. 579, 66 Stat. 420) provides that as to all property, including both the property in the possession of the bankrupt and that not in his possession, the trustee in bankruptcy shall be considered a lien creditor.

[3]If the trustee in bankruptcy is to be considered a judgment creditor under Section 70 c of the Bankruptcy Act then he is, as this Court indicated in *Sampsell v. Straub,* 194 F. 2d 228, 231, a "hypothetical" judgment creditor. Most certainly he is not a judgment creditor in the ordinary, usual or conventional sense

The question of whether a trustee in bankruptcy is a judgment creditor within the meaning of Section 3672, insofar as we know, has been considered in only three cases.[4] See *In re Ann Arbor Brewing Co.,* 110 F. Supp. 111 (E.D. Mich.); *United States v. Sands,* 174 F. 2d 384 (C.A. 2d); *In re Taylorcraft Aviation Corp.,* 168 F. 2d 808 (C.A. 6th). In both the *Ann Arbor Brewing Co.* case and the *Taylorcraft Aviation* case it was held that the trustee in bankruptcy was not a judgment creditor within the meaning of Section 3672. The Second Circuit's statement in the *Sands* case to the contrary is mere dictum. The question in that case was whether the Government's claim for taxes was to be postponed to the claimants in Section 64 a (1) and (2), where no notice of lien had been filed but the Collector had taken possession of the personal property of the bankrupt. In any event, the decision in the *Sands* case seems clearly contrary to what was said by the Supreme Court in *Gilbert Associates* and *United States Security Tr. & Sav. Bk.,* and this Court in *United States v. Sampsell,* 153 F. 2d 731.

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which is the sense the words "judgment creditor" are used in Section 3672 of the Code.

[4]After this brief had been prepared but before it was filed, our attention was called to the recent decision in *In the Matter of Green,* 124 F. Supp. 481 (N.D. Ala.). In that case the question of whether a trustee in bankruptcy is a judgment creditor within the meaning of Section 3672 was squarely presented. The Court held that a trustee in bankruptcy is not a judgment creditor within the meaning of Section 3672, citing *United States v. Gilbert Associates, supra,* and Justice Jackson's concurring opinion in *United States v. Security Tr. & Sav. Bk., supra.* The court pointed out (p. 482) that it did not intend to say that "a trustee in bankruptcy does not occupy the fictitious position of judgment creditor" under Section 70 c of the Bankruptcy Act but merely that "a bankruptcy trustee is not a 'judgment creditor' within the purview of 26 U.S.C.A. §3672."

The history of Section 3672 shows that it was enacted to protect lienors who acted without knowledge of the Government's lien for taxes. It was merely a recordation statute. Its purpose was not to deprive the Government of its tax liens merely because the taxpayer was declared a bankrupt before notice of the lien had been filed.[5]

The trustee in bankruptcy takes all the personal property not in the possession of lienors. His taking possession of that property in no way affects the pri-

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[5]In his concurring opinion in *United States v. Security Tr. & Sav. Bk., supra,* pages 51-53, Justice Jackson went into the history of Section 3672 and the circumstances which led to its enactment. After pointing out that in *United States v. Snyder,* 149 U.S. 210, it was held that a tax lien was a valid binding lien even against a bona fide purchaser for value without knowledge or notice of the existence of such a lien, he said (pp. 52-53):

> Thereafter the statute was amended and a proviso added which said: "* * * That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector * * *" in the appropriate place for filing. 37 Stat. 1016. The House Report accompanying the proposed amendment, H. R. Rep. No. 1018, 62d Cong., 2d Sess. 2 (1912), said in part, after citing the above case:
>
> > "* * * the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien."

See, also:

Detroit Bank v. United States, 317 U.S. 329, 334.

As a result of the decision in 1938 in *United States v. Rosenfield,* 26 F. Supp. 433 (E.D. Mich.), Section 3672 was amended by the Revenue Act of 1939 so as to include "pledgee" among classes enumerated. See H. Rep. No. 855, 76th Cong., 1st Sess., page 26 (1939-2 Cum. Bull. 504, 523-524).

ority of lien creditors, except as prescribed in Section 67 c. As this Court said in *United States v. Sampsell, supra,* (p. 735): "The trustee acquires no better title than the bankrupt himself had." See also *Security Warehousing Co. v. Hand,* 206 U.S. 415; cf. *United States v. Fogarty,* 164 F. 2d 26 (C.A. 8th).

CONCLUSION.

For the reasons herein stated, the order of the District Court confirming the order of the referee in bankruptcy should be reversed to the extent it disallowed the claim of the Government that it had valid liens for unpaid taxes and interest in the amount of $945.37 which were entitled to the priority of payment prescribed by Section 67 of the Bankruptcy Act.

Respectfully submitted,

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December, 1954.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is

authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

REVISED STATUTES:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as

to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1952 ed., Sec. 191.)

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840:

SEC. 64 [As amended by Section 12 of the Act of June 28, 1946, c. 512, 60 Stat. 323, and Section 131 of the Act of May 24, 1949, c. 139, 63 Stat. 89]. DEBTS WHICH HAVE PRIORITY.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the

court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis; whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States in [*sic*] entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however,* That

such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

* * * * * * *

(11 U.S.C. 1946 ed., Sec. 104.)

SEC. 67. LIENS AND FRAUDULENT TRANSFERS.—* * *

* * * * * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this

Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act.

* * * * * * *

(11 U.S.C. 1946 ed.. Sec. 107.)

SEC. 70. TITLE TO PROPERTY.—* * *

* * * * * * *

c. [As amended by Section 2 of the Act of March 18, 1950, c. 70, 64 Stat. 24]. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property of the bankrupt at the date of bankruptcy whether or not coming into possession or control of the court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists.

* * * * * * *

(11 U. S. C. 1946 ed., Supp. IV, Sec. 110.)

itor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists.

* * * * * * *

(11 U.S.C. 1946 ed., Sec. 110.)

No. 14,467

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Bradford Welch, Inc., a Corporation, Bankrupt,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLEE'S REPLY BRIEF.

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On Appeal from the United States District Court for the Northern District of California.

APPELLEE'S REPLY BRIEF.

The facts as set forth in the brief of the United States are not disputed by appellee. Further, the trustee does not deem it necessary to respond to the argument of the Government as to whether it introduced proof sufficient to establish that it had liens for unpaid taxes and interest in the amount of $945.37 which arose upon the assets of Bradford Welch, Inc. before it was adjudged a bankrupt. The sole question presented is whether or not such liens, good as against the bankrupt, are valid against appellee, the

latter's trustee in bankruptcy, and therefore entitled to payment over and above all other priority claims for taxes filed in the subject bankruptcy proceeding.

UNDER THE PROVISIONS OF SEC. 70 OF THE BANKRUPTCY ACT, THE TRUSTEE IS A JUDGMENT CREDITOR WITH A LIEN, WITH PRIORITY OVER THE GOVERNMENT'S UNRECORDED LIEN.

Priority claims for taxes have been filed in the bankruptcy proceeding by the United States, the Department of Employment of the State of California, the Board of Equalization of the State of California, the Franchise Tax Board of the State of California, and the County of San Mateo and City of San Mateo. The United States claims a lien upon the moneys of the estate, as against these other priority tax claims who have not asserted or filed any liens, and the United States having not recorded such lien or made any seizure of the bankrupt's property prior to the bankruptcy.

It is the contention of the trustee that he took possession of the bankrupt's property as of the date of the bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon, whether or not such a creditor exists, (Section 70(c) of the Bankruptcy Act), and that by reason thereof and the fact that the United States had failed to seize the property prior to the commencement of the bankruptcy proceeding, the proceeds of such property should be distributed ratably among all tax claimants, including the United States.

We concede that if a lien exists, the lienor is entitled to payment before all persons *without liens* who are given priority by Section 64 of the Bankruptcy Act, except that statutory lienors are postponed in certain cases to claimants without lien having priority under Section 64. If there is no surplus above the amount of the liens, there is nothing for creditors who are given priority, nor for general creditors.

Liens for taxes are, of course, statutory; and a statutory lien does not have to be perfected or be a specific lien to come within the protection of Section 67(b) of the Bankruptcy Act. (*United States v. Sampsell,* 153 F. 2d 731 (CCA9).)

Section 3671 of the Internal Revenue Code provides that the lien shall arise at the time the assessment list was received by the Collector of Internal Revenue and shall continue until the liability for such amount is satisfied. Section 3670 of said Code provides, in effect, that until notice of any federal tax lien is filed by the Collector in the office of the Clerk of the United States District Court, the lien shall not be valid as against any mortgagee, purchaser or *judgment creditor.*

It has been declared that a bankruptcy trustee takes the property of a bankrupt charged with tax liens which were specific and complete prior to the filing of the petition in bankruptcy, and also takes the property charged with any other liens then in legal existence. (*Re Taylorcraft Aviation Corp.,* 168 F. 2d 808 (CCA6).)

But a trustee takes not only "the title of the bankrupt but also the rights of a judgment creditor with a lien of the date of adjudication as against conflicting liens." *Re Jackson Light & Traction Co.,* 269 F. 223 (CCA5), and in 4 Remington on Bankruptcy (5th Ed.) 345, the following statement appears:

> "Subdvision (c) of Sec. 70, last sentence, therefore vests the trustee with all the rights which any creditor might have secured at bankruptcy had he foreseen the impending bankruptcy and successfully established himself at the moment of bankruptcy with a lien by legal proceedings on all property in the bankrupt's possession and with all the rights of an execution creditor with execution returned nulla bona on other property. By legislative fiat the trustee is instantly vested on his appointment with those rights as of the date of the filing of the bankruptcy petition."

This then raises the question: Does a trustee take possession as a judgment creditor with a lien which, in the absence of any seizure or recordation of a lien by another creditor entitled to lien, places the trustee on a level above such creditor or on a parity with it? And, if so, does not the trustee's lien then revert to the benefit of other priority tax claimants, of the same class as the lien creditor?

> "One of the main purposes of the bankruptcy law is to attain a uniform and equitable distribution of bankrupt estates, which would be largely defeated by discrimination between those creditors who had and who had not heard of unrecorded claims."

In re Horton, 31 F. 2d 795 (DCLa).

The above statement had reference to creditors other than tax claimants, but in these days of many conflicting tax agencies the principle can well be applied to that class of creditors.

The Government in its brief has cited a number of cases in support of its argument upon which we desire to dwell.

United States v. Security Trust & Savings Bank, 340 U.S. 47, merely held that the Collector's lien took precedence over an attachment lien which, under California law, is "only a potential right or a contingent lien" until the attaching creditor secures judgment. Justice Jackson's statement therein that "only a judgment creditor in the conventional sense is protected" lends support to appellee. The Court, in making this statement, was merely stating that a creditor with an attachment, not a judgment lien, had to yield to a subsequently *recorded* lien of the Government. We quite agree. But if the trustee is held to be a judgment creditor with a lien, and the Government has not recorded its lien, he should, under the language of the above mentioned decision, take priority over the Government or, at worst, be granted parity with the Government's claim.

In *United States v. City of Greenville,* 118 F. 2d 963, the question was as to the right of a state and county to priority for taxes on real property subsequently assessed over an antecedent lien of the United States, duly recorded. The United States was rightfully given priority.

We also believe that the decision of *United States v. Sands,* 174 F. 2d 304 can be differentiated from the facts in this proceeding. In that matter the referee in bankruptcy had held that no lien was acquired by the Government on the property since no notice thereof had been filed in a local recording office, and hence the claim for taxes was postponed to both the expenses of administration and claims for wages under Section 64(a) of the Bankruptcy Act. However, the property had been seized by the United States two weeks before bankruptcy, and the Appellate Court correctly held that such seizure and possession obviated the necessity of recordation.

Appellant also cites *United States v. Gilbert Associates, Inc.,* 345 U.S. 361. This decision does not, in the opinion of appellee, impair his argument. The facts also differ from those in this proceeding. A very important distinction is that in the *Gilbert* case the United States filed a notice of its lien with the Clerk of the United States District Court (which it did not do in the Bradford Welch proceeding) and the Supreme Court held that it theretofore took precedence over a general lien of the Town of Walpole which under state law was an assessment of a tax in the nature of a judgment. We cannot quarrel with the reasoning of this decision. Section 3672 of the Internal Revenue Code gave strength to the lien of the United States as soon as the lien was filed with the Clerk of the United States District Court and as the Town of Walpole had not either secured a judgment nor recorded a tax lien nor seized the property, the Government was entitled to priority.

Also in the case of *United States v. City of New Britain,* 347 U.S. 81, a conflict existed between the United States and state taxing agencies through the attempt of the latter to assert precedence of state law over that of Congress. The Court pointed out that the taxpayer was not insolvent and that the property involved was real and not personal and went on to say that:

> "This case is distinguishable from *United States v. Gilbert Associates, Inc.,* because that was a case involving personal property and insolvency of the taxpayer."

The trustee is not asserting any right under state statute. He is basing his contentions on the language of Section 70(c) of the Bankruptcy Act.

While the Court for this Circuit has not had occasion to pass upon the question upon which this appeal is based, it did say in *Sampsell v. Straub,* 194 F. 2d 228, a case concerned with the effect of the recordation of a homestead by the bankrupt after his adjudication:

> "Referring to Secs. 3 sub. a(3) and 67, sub. a,—both sections are designed a prevent creditors of the bankrupt who obtained no preferred status in the normal course of the business transactions out of which their claim arose, from later impressing the property of the insolvent debtor with liens obtained thru diligent resort to legal proceedings. Their purpose is thus to implement a fundamental policy of maintenance of equality among general creditors after insolvency . . .
>
> "Sec. 70, sub. c, on the other hand, is employed primarily to protect general creditors of the bank-

> rupt against secret liens. To this end the trustee is given all the rights which a creditor with a lien by legal or equitable proceedings would enjoy. The trustee unquestionably enjoys the right of a creditor who has levied attachment or execution on the bankrupt's property.
>
> * * * * * * *
>
> "For whether its impact on a particular case is upon secret liens or upon some other impediment to the distribution of the debtor, Sec. 70 sub. c, embodies a comprehensive conception of according the trustee such status as a diligent general creditor might have achieved but for the intervention of bankruptcy."

The above language may well be applied to the subject controversy. The United States did not levy upon or seize the property of the bankrupt before it came into the possession of the trustee. The trustee "enjoys the right of a creditor who has levied attachment or execution on the bankrupt's property." Then he may be considered to hold the property of the bankrupt under a lien based upon actual physical seizure and possession, which would take priority over the "paper" lien of the United States.

We may even go so far as to denominate this latter lien a secret lien, as other tax claimants or authorities would have no knowledge of it when the Collector approved its assessment. It is so general and all inclusive, (extending, as it does, to all property, whether real or personal, belonging to a person liable to pay any United States tax, and including, as it does, interest, penalty, additional amount, or addition

to such tax, together with costs), as to defeat the interest and purpose of the Bankruptcy Act in providing its own tests of priority, security, and payment to creditors. The generality and all pervasiveness strikes at the very foundation of the Bankruptcy Administration so far as personal property owned by a bankrupt is concerned. No notice to the bankrupt's (taxpayer's) debtors is given and none is required, since neither the extent nor location of the delinquent taxpayer's property may be known to the collector. It is completely possible that all of the assets of a bankrupt might be impressed with the lien of Section 3670 of the Internal Revenue Code to the exclusion of all other supposedly secured creditors in the bankruptcy proceeding. Each such creditor might have furnished the materials or labor used in the business completely in ignorance of the tax lien having been filed and no matter how he may attempt to secure himself for payment find that under Section 3670 he is subsequent in right to the United States.

In the instant case, even granting that the lien of the United States under the section extends to debts owed to its delinquent taxpayer, the bankrupt herein, no attempt to reduce the debts to its possession was made, no effort to apply the lien to any specific property was attempted, no proceeding of any variety was initiated to make definite or certain the property to be covered by the lien. Thus, it is submitted that the Government's general lien should, in bankruptcy, be considered inchoate and ineffective as against the trustee herein.

CONCLUSION.

It is submitted that the order of the District Court affirming the order of the referee in bankruptcy disallowing the claim of the Government that it had valid liens for unpaid taxes and interest in the amount of $945.37 which were entitled to the priority of payment, should be affirmed.

Dated, San Francisco, California,
January 26, 1955.

Respectfully submitted,
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